NLWJC - KAGAN

STAFF & OFFICE - D.C. CIRCUIT

BOX 002 - FOLDER 012 DC

Elena Kagan Law Review 4 [3]

FOIA Number: Kagan

FOIA MARKER

This is not a textual record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

Collection/Record Group: Clinton Presidential Records

Subgroup/Office of Origin: Counsels Office

Series/Staff Member: Sarah Wilson

Subseries:

OA/ID Number: 14685

FolderID:

Folder Title:
Elena Kagan Law Review 4 [3]

Stack:	Row:	Section:	Shelf:	Position:
V	13	2	10	3

limit the government's ability to place its thumb on the scales in the marketplace of ideas established in most jury deliberations. n141 Even if diversity rather than representation is the principal objective of the Hennepin County proposal, proportionality may remain an essential constraint.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n141 But see Lockhart v. McCree, 476 U.S. 162, 178 (1986) (declaring that "an impartial jury consists of nothing more than 'jurors who will conscientiously apply the law and find the facts,' " so that the exclusion of all Republicans might be permissible if the Democrats and Libertarians who remained on a jury were fair-minded people who would conscientiously apply the law to the facts).

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

The principal purpose of the Hennepin County proposal is not to enhance any group's aggregate voting power. It is to guarantee that minority voices will be heard in every case rather than loudly in one, softly in another, and not at all in a third depending on the luck of a random draw. Nevertheless, the appropriate baseline for judging proportional representation is probably the percentage of minority-group members in the adult population rather than the proportion of minority-group members who have served on a county's juries in the past. n142 Within the limits of proportionality set by this baseline, the Hennepin County proposal could increase the number of minorities on grand juries. Hennepin County has,
[*741] however, bounded diversity with a fair and sensible principle of proportionality.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n142 The underrepresentation of minorities on juries seems at least partly attributable to circumstances for which the government may bear responsibility--for example, the government's inability to deliver jury summonses and questionnaires to minority-group members at the same rate as to whites. In light of its responsibility for part of the underrepresentation of minorities, Hennepin County's decision to treat adult population figures as the relevant baseline for judging proportionality seems at least constitutionally permissible. Hennepin County Final Report, supra note 19, at 27. Other baselines would be more problematic; a county might, for example, provide that the proportion of minority-group members on its grand juries should approximate the proportion of minority-group suspects or victims in the cases that grand juries consider.

In voting rights cases, the Supreme Court generally has referred to adult population figures in assessing whether minorities have been over- or underrepresented. See, e.g., Thornburg v. Gingles, 478 U.S. 30, 38-39 (1986). In Johnson v. De Grandy, 114 S. Ct. 2647, 2662 n.18 (1994), the Court declined to decide whether the appropriate baseline for judging the representation of Latinos in Florida was the percentage of Latinos in the state's entire population, in the state's population of adult residents, or in the state's population of adult citizens. The Court did not mention the percentage of Latinos in the state's population of registered (or actual) voters as a possible baseline.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

IX. The Downside

The preceding Part considered some possibly troublesome aspects of Hennepin County's proposed methods of jury selection. The principal objection to these color-conscious methods, however, is simply that they are color-conscious. A program grounded on the perception that the members of different races have different viewpoints may make it more likely that racially distinctive viewpoints will persist. This program may encourage people to view themselves and others in racial terms. n143

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n143 Justice O'Connor wrote for the Supreme Court in Shaw v. Reno, 113 S. Ct. 2816, 2832 (1993):

Racial classifications of any sort pose the risk of lasting harm to our society. . . . Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters--a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

For the most part, the Hennepin County proposal competes, not with tangible opposing interests, but with an ideal of colorblindness. n144 And the Supreme Court's decisions on the importance of color-blindness have vacillated. n145 In cases named Bakke, n146 Stotts, n147 Wygant, n148 Croson, n149 and Shaw v. Reno, n150 the Court has struck down color-conscious affirmative action measures under either the Equal Protection Clause or Title VII. In cases named Green, n151 Swann, n152 Barresi, n153 Carey, n154
[*742] Weber, n155 Fullilove, n156 Sheet Metal Workers, n157 International Ass'n of Firefighters, n158 Paradise, n159 and Metro Broadcasting, n160 the Court has upheld color-conscious affirmative action measures or has itself mandated color-conscious remedies for past discrimination. Nancy King has commented, "The cases give . . . the impression that just when the Court gets going . . . , it forgets its destination . . . ." n161

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n144 Without endorsing an ideal of color-blindness, however, one might object to racial quotas simply on the ground that they make race--one characteristic among many--too important. Deborah Ramirez has made this point eloquently: "I am Latino. But I am also a mother, lawyer, teacher, wife. I don't like being reduced to one aspect of myself." Letter to author from Deborah A. Ramirez (Aug. 19, 1994) (on file with author).

n145 See Shaw, 113 S. Ct. at 2824 ("This Court never has held that race-conscious state decisionmaking is impermissible in all circumstances.").

n146 Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978).

n147 Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984).

n148 Wygant v. Jackson Bd. of Educ., 478 U.S. 1014 (1986).

n149 City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

n150 113 S. Ct. 2816 (1993).

n151 Green v. County School Bd., 391 U.S. 430 (1968).

n152 Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

n153 McDaniel v. Barresi, 402 U.S. 39 (1971).

n154 United Jewish Organizations v. Carey, 430 U.S. 144 (1977).

n155 United Steelworkers of America v. Weber, 443 U.S. 193 (1979).

n156 Fullilove v. Klutznick, 448 U.S. 448 (1980).

n157 Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986).

n158 Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986).

n159 United States v. Paradise, 480 U.S. 149 (1987).

n160 Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990).

n161 King, supra note 21, at 766.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

As the judiciary has found itself unable to provide leadership on the issue, the two other branches of government, usually with less ambivalence, have concluded that race cannot be disregarded. President Clinton campaigned for office on a promise to make his cabinet and the rest of his administration look like America. n162 Following his election, the President sought to fulfill his promise partly by making repeated efforts to ensure that the Attorney General of the United States would, for the first time, be a woman. n163 Clinton's predecessor in the White House, a member of a different political party, made obvious efforts to ensure continued African-American representation on the Supreme Court. n164 Congress has repeatedly approved minority set-asides and preferences, measures that seem more likely to be the result of troublesome rent-seeking behavior than jury-selection quotas, which do not distribute the government's wealth. n165

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n162 See Judy Keen, Clinton to Be Held to Vow of Diversity, USA Today, Nov. 13, 1992, at A1.

n163 See Ruth Marcus, Clinton Nominates Reno at Justice, Wash. Post, Feb. 12, 1993, at A1.

n164 See Maureen Dowd, The Supreme Court: Conservative Black Judge, Clarence Thomas, Is Named to Marshall's Court Seat, N.Y. Times, July 2, 1991, at A1.

n165 See, e.g., Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116 (codified in significant part at 42 U.S.C. sections 6705(e)-6707(j) (1988)) (upheld in Fullilove v. Klutznick, 448 U.S. 448 (1980)); Continuing Appropriations Act for Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329-31 (1987) (upheld in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990)); Act of Nov. 14, 1983, Pub. L. No. 98-151, 97 Stat. 964, 970 (uncodified foreign aid appropriation); Act of Jan. 6, 1983, Pub. L. No. 97-424, section 105(f), 96 Stat. 2100 (uncodified highway construction appropriation); see also 42 U.S.C. section 2000e17 (1988) (authorizing government contracts with employers who implement affirmative action programs).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

[*743]

Presidents and other elected officials are not color-blind, and in that respect they are not very different from the rest of us. n166 One wonders how many American universities, colleges, high schools, research institutes, television talk shows, Y.M.C.A.'s, Rotary Clubs, and church groups conduct forums on racially sensitive issues (for example, the use of color-conscious methods in jury selection) without deliberately including one or more minoritygroup speakers on their programs. Why do these groups act to ensure racial and ethnic diversity among their speakers when they do? The planners of public programs probably do not expect minority-group participants to speak for racial or ethnic groups rather than presenting their own carefully considered positions. Nevertheless, these planners may sense that the experience of being a member of a minority group in America is distinctive--a something and not a nothing. This experience may contribute to what a speaker has to say, and the participation of people with this experience may help to keep the rest of us from floating too far out to sea. What is true of Rotary Club programs in Massachusetts and Montana is equally true of grand juries in Minnesota, and when Presidents are elected to office on the basis of promises to make their administrations look like America, making Hennepin County grand juries look like Hennepin County seems legitimate and appropriate.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n166 Note, for example, the sub rosa efforts of trial judges to avoid all-white juries described supra text accompanying notes 87-96.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Americans are not color-blind. They cannot be. The Constitution does not require them to pretend to be. The Constitution requires only that the government not stigmatize or otherwise disadvantage people on the basis of race (at least not without a sufficiently compelling reason for doing so). The jury selection methods proposed in Hennepin County do not stigmatize or disadvantage people on the basis of race, and I believe that they are constitutional.

LEVEL 1 - 38 OF 96 ITEMS

Georgetown Law Journal

November, 1997

86 Geo. L.J. 279

LENGTH: 51231 words

ARTICLE: Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric

MICHAEL SELMI*

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

* Associate Professor, George Washington University Law Center. J.D. Harvard Law School, 1987; A.B. Stanford University, 1983. I am indebted to Lou Bilionis, Roy Brooks, Charlie Craver, Tom Dienes, Pauline Kim, Linda Hamilton Krieger, Chip Lupu, Deborah Malamud, Molly McUsic, Larry Mitchell, Charles Ogletree, Wendy Parker, David Sutphen, Mark Tushnet, and the participants in a faculty workshop at George Washington University for their comments on earlier drafts of this article. Laura Leacy and Leslie Lee provided excellent research and library assistance.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

SUMMARY:
... Discrimination affects us in so many ways, infiltrating so many parts of our lives, that it is nearly impossible to identify what is, or what is not, the product of discrimination. ... Echoing its earlier decision in Gomillion v. Lightfoot, the Batson Court began its analysis by noting that under certain circumstances, the discriminatory impact of a practice may give rise to an inference of discrimination "because in various circumstances the discrimination is very difficult to explain on nonracial grounds." ... Justice Powell's insistence that the end of racial prejudice cannot be legislated recalls the Supreme Court's use of the impotent "all deliberate speed" standard to implement its decision in Brown. Legal process scholars applaud this formulation as a product of keen judicial compromise; and yet their approbation prompts the following question: in what sense is state-sponsored race discrimination a proper subject for compromise? This is a point Thurgood Marshall expressed at oral argument in Brown II, when he asked the Court why it was that whenever an African-American plaintiff, and only an African-American plaintiff, came before the Court he was always told that he would have to wait for relief? The Court did not then answer, and has not since answered, Justice Marshall's question -- perhaps because there is no satisfactory explanation for the Court's willingness to compromise when it comes to racial equality. ...

TEXT:
[*279] [*280] INTRODUCTION

What would a nondiscriminatory world look like? Would every other American President be a woman, and every seventh an African-American? Would we expect a

similar number of male and female professors in all fields, or might there be differences of representation based on certain skills or interests, and if so, where would those skills or interests have originated? In politics, would we expect Congress to resemble America in its composition so that, for example, in a state where African-Americans comprise thirty percent of the population, thirty percent of that state's representatives would be African-American? n1 And in the construction industry, would we expect the number of contractors to approximate the population of the relevant area? In a predominantly African-American city like Richmond, Virginia, would we expect a majority of the contractors to be African-Americans? n2 If not, why not?

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 See Shaw v. Reno, 509 U.S. 630 (1993).

n2 See City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

This thought experiment -- trying to imagine what a nondiscriminatory world would look like -- is complicated by the fact that we immediately become trapped by both the present and the past. Discrimination affects us in so many ways, infiltrating so many parts of our lives, that it is nearly impossible to identify what is, or what is not, the product of discrimination. Our current and past discrimination deprive us of the kind of information that would be necessary [*281] to evaluate the reality of a nondiscriminatory world. Without a metric or scale that can tell us what parts or subparts of our world were formed, influenced, or shaped by discrimination, we are left without an objective means for untangling the causal chain of discrimination. When we ask whether African-Americans and whites would seek, and win, political office at the same rate, we can only know that the existing evidence is tainted by our history of discrimination. Therefore, when faced with the question of whether there would be an equal number of men and women or African-Americans and whites in all professions, the only plausible response is: how could we possibly know? n3

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n3 Justice Souter recently explored this issue in a dissenting opinion in which he questioned whether it was segregation, or the efforts to remedy segregation, that caused the severe racial imbalance existing in so many urban schools today. See Missouri v. Jenkins, 515 U.S. 70, 164 (1995) (Souter, J., dissenting).

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

And yet, when the question of discrimination arises in a legal setting, a court is not afforded the luxury of answering with an "I don't know." Instead, as Richard Gaskins has noted, "the judicial process has the unique social role of declaring winners and losers in every case, whether or not the conditions for responsible induction are present." n4 Indeed, it is generally impermissible for a court to rule that a decision is too difficult to resolve or, absent rare circumstances, that a particular dispute is not susceptible to a legal determination. n5 So when faced with the question of what one would expect a nondiscriminatory world to look like, a court must provide an answer.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n4 RICHARD H. GASKINS, BURDENS OF PROOF IN MODERN DISCOURSE 29 (1992).

n5 Reaching a decision is so central to the legal process that even when a jury is unable to agree on a verdict, it typically reports a numerical breakdown of how its members were leaning either for or against the plaintiff. See, e.g., Seth Mydans, The Other Menendez Trial, Too, Ends with the Jury Deadlocked, N.Y. TIMES, Jan. 29, 1994, at A1 ("Only three of Lyle's jurors voted for the most serious charge of first-degree murder . . . five did so on [Erik's] jury"). To be sure, there are ways a court can avoid deciding an issue through procedural or jurisdictional maneuvers. Two such methods involve the political question doctrine and abstention. See, e.g., Colorado River Conservation Dist. v. United States, 424 U.S. 800 (1976) (abstention doctrine); Baker v. Carr, 369 U.S. 186 (1962) (political question doctrine). Nevertheless, it would clearly be illegitimate for a court to write a decision declaring its inability to make up its mind.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

This question, and the Supreme Court's approach to it, I suggest, is central to understanding the Court's jurisprudence regarding issues of discrimination. It is central to the Court's jurisprudence because how one defines discrimination, specifically how the Court has defined discrimination, is premised on one's expectations of what a nondiscriminatory world would look like. To the extent one believes that a nondiscriminatory world would look very different from our current world -- that it might, for example, include proportionate representation in Congress -- deviations from that expectation will demand an explanation and may raise a presumption that the deviations are the product of discrimination. n6 On the other hand, for those who do not believe that discrimination is a powerful explanatory variable, those same deviations may fail even to rouse suspicions, let alone call for an explanation.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n6 For a theoretical treatment along these lines, see RONALD FISCUS, THE CONSTITUTIONAL LOGIC OF AFFIRMATIVE ACTION 24-29 (1992).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*282] Consider one example from the affirmative action context. On several occasions, Justice O'Connor has stated that there is no reason to expect individuals from diverse racial and gender groups to be proportionally represented across occupations. n7 In the construction industry, for example, she saw no reason to expect a nondiscriminatory setting to produce proportional numbers of African-American and white contractors. n8 Consistent with this vision, no reasonable conclusion was to be drawn from the fact that an industry is dominated by white men. n9

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n7 See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507 (1989) (noting that the 30% goal at issue "rests upon the 'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their

representation in the local population"); Sheet Metal Workers v. EEOC, 478 U.S. 421, 494 (1986) (O'Connor, J., concurring in part and dissenting in part) ("It is completely unrealistic to assume that individuals of one race will gravitate with mathematical exactitude to each employer or union absent unlawful discrimination.").

n8 See Croson, 488 U.S. at 507.

n9 In her Croson opinion, Justice O'Connor equivocates on what the basis for the disparities might be. At one point she notes, "It is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination," while later in the opinion she offers some reasons for the disparities, including "past societal discrimination in education and economic opportunities as well as both black and white career and entrepreneurial choices." Id. at 499, 503. She also notes that "blacks may be disproportionately attracted to industries other than construction," though here she does not explore the possible reasons for the disparate career choices. Id.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Although Justice O'Connor's position is deeply embedded in the affirmative action folklore, n10 a strong argument can be made that she has the presumption exactly backwards. Absent some explanation, the expectation should be that diverse groups would seek jobs in roughly similar proportions. After all, is there any reason to believe that in a nondiscriminatory setting African-Americans would not desire to enter the construction industry with the same interest or intensity as their white counterparts? If no such reason exists, how does one explain the fact that the city of Richmond awarded ninety-nine percent of its contracts to white contractors? n11 Should the fact that such an extraordinarily high percentage of contracts went to white contractors be presumed to be the product of discrimination? Should a court at least demand a race-neutral explanation for the contract distribution? n12 In asking these questions, I do not mean to suggest that there is no available justification for the disparities; rather, significant deviations from what could statistically be expected from a neutral process ought to be explained.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n10 For example, appellate judges cited Justice O'Connor's statement from Croson in the following cases: Ensley Branch, NAACP v. Seibels, 31 F.3d 1548, 1570 (11th Cir. 1994); Peightal v. Metropolitan Dade County, 26 F.3d 1545, 1558 (11th Cir. 1994); Birmingham Reverse Discrimination Employment Litig. v. Arrington, 20 F.3d 1525, 1548 (11th Cir. 1994), cert. denied, 514 U.S. 1065 (1995); Contractors Ass'n of E. Pa., Inc. v. King County, 941 F.2d 910, 924 (9th Cir. 1991); Cone Corp. v. Hillsborough County, 908 F.2d 908, 915 (11th Cir. 1990), cert. denied, 498 U.S. 983 (1990); Mann v. City of Albany, Georgia, 883 F.2d 999, 1005 (11th Cir. 1989).

n11 Croson, 488 U.S. at 479 (noting that "while the general population of Richmond was 50% black, only 0.67% of the city's prime construction contracts had been awarded to minority businesses [between 1978-1983]").

n12 Commenting on the Croson case, Professor Cheryl Harris has noted that the Supreme Court relies on a different presumption, one in which "the existing state of affairs is considered neutral, and fair, however unequal or unjust it

is in substance." Cheryl I. Harris, Whiteness as Property, 106 HARV. L. REV. 1709, 1777 (1993) (footnote omitted).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

[*283] These questions relating to the assumptions that flow from one's expectations are deeply intertwined with the development of the Court's antidiscrimination doctrine. As I will discuss in detail, the Court's jurisprudence relating to proving discrimination developed primarily in the early 1970s based on loose assumptions that discrimination provided an explanation for otherwise unexplained deviations from what would be expected in a race-neutral world. Based on this assumption, the Court not only developed a formal and now familiar model of proof to adjudicate employment discrimination cases, n13 but also created similar models to identify discrimination violative of the Equal Protection Clause in jury selection, voting, and housing. n14 These models all relied on basic evidentiary principles that could be adapted to address discrimination that is subtle or overt, conscious or unconscious, intentional or unintentional, and brought as both constitutional and statutory claims. n15

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n13 See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 257-58 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973). The proof structure for employment cases is discussed in detail infra Part IIC3.

n14 See Batson v. Kentucky, 476 U.S. 79, 93-95 (1986) (jury discrimination); Thornburg v. Gingles, 478 U.S. 30, 48-51 (1986) (statutory voting claims); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266-68 (1977) (housing discrimination).

n15 These issues are developed in infra Part II.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Significantly, the Court's models never clearly identified which acts would be classified as discriminatory, but rather offered guidelines concerning what types of evidence provided indicia of discrimination. These guidelines were necessary because a finding of discrimination is ultimately a factual determination -- one that generally requires drawing an inference of discrimination based on circumstantial evidence. In essence, these models suggested that deviations from race-neutral expectations, when the deviations were in the form of significant statistical disparities or procedural irregularities, could be seen as the product of discrimination because our history suggested that discrimination was the most likely explanation when the deviations were otherwise unexplained. Consequently, these models functioned properly only when the courts applying them were willing to see discrimination as a viable explanation for social and political conditions -- a fact that was revealed most clearly in the Court's recent employment discrimination case, St. Mary's Honor Center v. Hicks. n16 Hicks altered the standards for proving employment discrimination under Title VII in a way that will likely make it more difficult to prove claims of discrimination. Combined with recent Supreme Court decisions in the affirmative action n17 and voting rights n18 contexts, the Hicks case signals a judicial presumption that discrimination no longer offers

an explanation for otherwise unexplained racial disparties. n19

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n16 509 U.S. 502 (1993).

n17 Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

n18 Miller v. Johnson, 515 U.S. 900 (1995).

n19 The Hicks case and its effect on proving discrimination will be discussed in greater detail in Part IIC3b.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*284] Although the recent cases strongly indicate that the Court no longer considers discrimination to be a vital part of contemporary American social and political life, it would be a mistake to see these cases as representing a dramatic shift from the Court's past practice or attitude. Rather, these cases are best seen as the culmination of the way in which the Court has defined discrimination over the last twenty years. Indeed, despite its rhetoric regarding the importance of ferreting out subtle discrimination, the Court has only seen discrimination, absent a facial classification, in the most overt or obvious situations -- situations that could not be explained on any basis other than race. Whenever the Court found room to accept a nondiscriminatory explanation for a disputed act, it did so.

As a practical matter, the result is that the Court now sees unlawful discrimination in the affirmative use of race, as occurs in the affirmative action cases or through racial redistricting, but is much less likely to identify discrimination in cases in which African-Americans are the victims of subtle discrimination. Indeed, despite a broad consensus that discrimination today is generally perpetrated through subtle rather than overt acts, n20 the Court continually refuses to adapt its vision to account for the changing nature of discrimination; as a result, it appears unable to see discrimination that is subtle rather than overt. In this way, the Court has never moved beyond its view of the world prior to the passage of civil rights legislation in the 1960s when explicit barriers prevented African-Americans and women from fully participating in social and economic life. As long as such blatant barriers do not exist, the Court has difficulty seeing discrimination. This limited vision explains why the Supreme Court can now see discrimination when a college denies admission to women, n21 or when a state restricts access to its political process for gay men and lesbians, n22 but not when the lone African-American supervisor in an organization is fired and the employer's reasons for firing him are disproved, n23 or when Latinos are disqualified from serving on juries because of their ability to speak Spanish. n24 The cases in which the Court identified violations all involved explicit barriers that constituted familiar examples of discrimination, while the latter cases required the [*285] Court to draw inferences of discrimination based on circumstantial evidence -- an inference the Court has repeatedly demonstrated it is unwilling to make.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n20 The Supreme Court itself has long recognized that discrimination is generally subtle in form. See infra notes 42-43 and accompanying text.

n21 See United States v. Virginia, 116 S. Ct. 2264 (1996) (considering equal protection challenge to admissions policy at Virginia Military Institute (VMI)). This article will focus primarily on race-based discrimination, though its implications apply in the gender context whenever the Court is required to infer discrimination. One primary difference between the two areas, reflected in the VMI case, is that states and employers continue to make explicit gender distinctions when such distinctions would be unthinkable in the context of race. As a result, the Supreme Court continues to encounter overt discrimination in gender cases, but not in the context of race discrimination, except in the areas of affirmative action and redistricting.

n22 See Romer v. Evans, 116 S. Ct. 1620 (1996) (holding that state constitutional amendment precluding all state action designed to protect individuals from discrimination based on sexual orientation violates the Equal Protection Clause).

n23 See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

n24 See Hernandez v. New York, 500 U.S. 352 (1991).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

In describing the Court's approach to discrimination issues, I have purpose-fully intermingled constitutional and statutory cases, and in the course of this article I will demonstrate that there is no substantial difference in how the Court approaches questions arising in these two contexts. Ordinarily, discussions of antidiscrimination law are divided between constitutional and statutory realms, and the doctrine is then further divided into particular contexts -- employment, voting, education, housing, or criminal law. n25 Those divisions, however, are largely artificial and the dividing lines can obscure our ability to understand the broader issues governing the Court's limited antidiscrimination vision. Along these lines, I will suggest that the vast commentary devoted to describing and critiquing the various proof structures and legal standards that govern antidiscrimination law have failed to grasp that it is the Court's expectations that determine what acts will be classified as discriminatory -- it is these expectations that give meaning to the models.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n25 See, e.g., Linda Hamilton Krieger, The Content of Our Categories: A Cognitive Bias Approach to Discrimination in Equal Employment Opportunity, 47 STAN. L. REV. 1161 (1995) (concentrating on Title VII law); Deborah C. Malamud, The Last Minuet: Disparate Treatment After Hicks, 93 MICH. L. REV. 2229 (1995) (concentrating on Title VII law); Richard H. Pildes & Richard G. Niemi, Expressive Harms, Bizarre Districts, and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno, 92 MICH. L. REV. 483 (1993) (concentrating on voting rights law).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Similarly, I will argue that the Court's distinction between intentional and unintentional discrimination is worthy of less attention than it received from commentators. Only the Court's limited vision of what constitutes intentional discrimination makes the distinction relevant, and yet this limited vision suggests that the Court would be unlikely to adopt an expansive interpretation

of discrimination even if it permitted constitutional challenges based on the impact of the challenged practice or policy. n26 As a result, the normative judgments and vision the Court brings to its discrimination cases would limit the force of an impact theory in the same fashion that it limits the Court's intentional discrimination doctrine.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n26 This issue is discussed in more detail infra Part IIIA. The Court's dichotomy is often characterized in various ways, including intentional versus unintentional discrimination; intent versus effects; and in the statutory context, disparate treatment versus disparate impact.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

This article will begin by defining what the Court means by intentional discrimination in order to clarify some of the existing confusion surrounding the concept. Part I, therefore, discusses the meaning of discrimination and demonstrates that intentional discrimination only requires proof of differential treatment, rather than proof of animus or illicit motive, and thus focusses primarily on questions of causation while devoting comparatively little attention to subjective mental states. Part II discusses the proof structures the Court developed in the early 1970s to deal with discrimination claims and illustrates how the Court's expectations regarding the force of discrimination largely explain its [*286] approach to issues of discrimination. Part II also demonstrates that implicit in the Court's initial approach was a belief that discrimination was a pervasive social phenomenon -- a belief that no longer, if it ever did, commands the view of the Court. Finally, Part III discusses various explanations for the Court's reluctance to see discrimination in any but the most obvious situations and concludes that the Court never fully embraced its own rhetoric, but instead refused to accept that discrimination offers a vital explanation for observed social phenomena such as discernible racial disparities. Moreover, in addressing issues of discrimination, the Court acted like the political branches by treating the issue of race as a subject for compromise and continually subjugating concerns of racial equality to other purported interests.

I. DEFINING DISCRIMINATION

In the area of antidiscrimination law, the most important and controversial Supreme Court decision in the post-Brown era is Washington v. Davis, n27 in which the Court held that the Equal Protection Clause only prohibits intentional discrimination. n28 This case had the practical effect of dividing antidiscrimination doctrine into two categories: intentional discrimination and unintentional discrimination. This division now runs through every distinctive subject area and dominates issues involving statutory as well as constitutional claims of discrimination. n29 The Court's decision in Washington v. Davis met a torrent of criticism, most of which focussed on the argument that by excluding claims of unintentional discrimination the Court limited the effectiveness of the Constitution's role in eradicating discrimination. n30 The force of this criticism, I will suggest, turns on how "intentional discrimination" is actually defined.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n27 426 U.S. 229 (1976).

n28 Id. at 239-40. In Washington v. Davis, the plaintiffs challenged the use of a written test to screen police officer candidates in the District of Columbia on the grounds that the test excluded a larger percentage of African-American candidates than white candidates.

n29 For areas outside the employment context in which the Court distinguished between intentional and unintentional discrimination, see Mobile v. Bolden, 446 U.S. 55 (1980) (holding that Fifteenth Amendment claims require showing of intentionally discriminatory denial of right to vote); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (holding that equal protection claims require showing of discriminatory intent). In the education context, the analogue to intentional and unintentional discrimination is the division between de jure and de facto discrimination. See Keyes v. School Dist. No. 1, 413 U.S. 189 (1973). The issue also arises frequently in statutory contexts. See Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) (reserving question whether age discrimination statute reaches unintentional discrimination); Guardian's Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983) (holding that private damage claims under Title VI require showing of intent); General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982) (holding that Section 1981 claims require showing of purposeful conduct); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (allowing disparate impact theory under Title VII).

n30 See, e.g., Theodore Eisenberg, Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication, 52 N.Y.U. L. REV. 36, 47 (1977); Charles R. Lawrence, III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317, 318-20 (1987); David Benjamin Oppenheimer, Negligent Discrimination, 141 U. PA. L. REV. 899, 967 (1993); Michael J. Perry, The Disproportionate Impact Theory of Racial Discrimination, 125 U. PA. L. REV. 540, 562-63 (1977); David A. Sklansky, Cocaine, Race and Equal Protection, 47 STAN. L. REV. 1283, 1312-14 (1995).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*287] To reach the core of this question, it is necessary to determine what can properly be treated as intentional discrimination -- a question that proves more difficult to answer than it may first appear. Indeed, intentional discrimination is too often defined by what it excludes, rather than by what it includes. Requiring proof of intent to establish a constitutional violation is said to mean that such a claim cannot be based solely on the effects of the challenged practice or policy, unlike certain statutory contexts in which it is possible to establish a claim based purely on the discriminatory effects of the practice or policy without proving intent. n31

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n31 See Griggs v. Duke Power Co., 401 U.S. 424 (1971) (applying disparate impact theory under Title VII); Pfaff v. United States Dept. of Hous. & Urban Dev., 88 F.3d 739, 745 (9th Cir. 1996) (applying disparate impact theory to housing discrimination under Title VIII). It is important to note that in statutory adverse impact cases the defendant always has the opportunity to justify the practice despite the disparate effects. See, e.g., 42 U.S.C. @ 2000e (1994) (setting forth standard for disparate impact claims under Title VII).

For this reason, as discussed infra Part IIIA, it is a mistake to assume that the Court's treatment of discrimination claims necessarily would have been any more favorable if the Court had allowed constitutional challenges to proceed on a theory of disparate impact. In claims premised on the disparate impact of a practice or policy, courts, including the Supreme Court, have shown a strong willingness to accept a defendant's justification for the challenged practice and, as a result, disparate impact cases are notoriously difficult to prove and infrequently brought. See, e.g., Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 651, 659 (1989) (rejecting claim that prima facie case of disparate impact made based on statistical evidence showing a high percentage of nonwhite workers in defendant's unskilled cannery jobs and a low percentage of such workers in skilled noncannery positions).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

But defining intentional discrimination by what it is not serves only as a starting point and fails to offer any meaningful content to the notion of intent. After all, on several occasions, including in Washington v. Davis itself, the Court has indicated that the effects of a policy can be relevant to proving intent. n32 Thus, the two inquiries, effects and intent, are not wholly unrelated, and the real question lies in what the Court accepts as proof of intenional discrimination. What kind of evidence will the court require as proof of intent?

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n32 See Washington v. Davis, 426 U.S. at 241-42; see also Batson v. Kentucky, 476 U.S. 79, 93-94 (1986) (noting that under certain circumstances discriminatory impact may give rise to inference of discrimination); Castaneda v. Partida, 430 U.S. 482, 498-99 (1977) (noting that, in some cases, large statistical disparities may give rise to inference of discrimination). In his concurring opinion in Washington v. Davis, Justice Stevens made the connection when he noted that "the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume." Washington v. Davis, 426 U.S. at 254 (Stevens, J., concurring).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Shifting the focus of inquiry to the nature of the evidence the Court accepts as proof of intentional discrimination places the critiques of the Court's decision to distinguish between intentional and unintentional discrimination in a different light. In this section, I will demonstrate that even though the Court has rarely found a violation when the evidence pointed toward subtle, rather than overt, discrimination, the Court's definition of intentional discrimination is broad enough to encompass most forms of subtle or unintentional discrimination, including most of the claims that have actually come before the Court. The reason for the Court's reluctance to identify subtle discrimination rests not in a [*288] preoccupation with intent, which generally plays a minor role in the Court's analysis, but rather in the Court's limited vision of what constitutes discrimination. In other words, it is not the Court's doctrine that has limited its vision, but the Court's vision has limited its doctrine. n33

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n33 This is not to say that the standard the Court adopts makes no difference. The advantage of an effects test comes largely through deterrence, in that such standards encourage employers or other decisionmakers to review policies for discriminatory effects as a way of avoiding litigation.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

A. DEFINING INTENT

Understanding the Court's doctrine relating to proving intentional discrimination necessitates defining what the Court means by intent. n34 By requiring proof of intent, does the Court mean to imply that malice or animus is a necessary element of intent? Relatedly, must the actor accused of discrimination be consciously aware of engaging in discrimination for the act to be classified as intentional discrimination?

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n34 It is worth noting that the concept of intent is hardly unique to antidiscrimination law and, in fact, pervades both criminal law and torts. See, e.g., W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS @ 8 (5th ed. 1984).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Given the importance of the notion of intent to antidiscrimination law, it is not surprising that both the Court and commentators frequently attempt to define the term. As already suggested, many of these efforts offer little insight, while others misconstrue the Court's doctrine. For example, the Court often uses the term "invidious discrimination" as a synonym for intentional discrimination, though "invidious" adds no significant meaning other than signalling that when discrimination is defined as "invidious" it will also be labeled unlawful. Other definitional attempts equate intent with animus, malice, or a conscious awareness, n35 all of which I will suggest represent a misunderstanding of how the Court has defined intent.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n35 See, e.g., Price Waterhouse v. Hopkins, 490 U.S. 228, 262-63 (1989) (O'Connor, J., concurring); Goodman v. Lukens Steel, 482 U.S. 656, 668 (1987); Pullman-Standard v. Swint, 456 U.S. 273, 277 (1982); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 579 (1978); Barbara J. Flagg, Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking, 104 YALE L.J. 2009, 2017 (1995) (defining differential treatment as "any variety of consciously different treatment"); Krieger, supra note 25, at 1177 ("Discrimination -- at least in race and national origin contexts -- is construed as resulting from hostile animus towards and accompanying negative beliefs about an individual because of his or her membership in a particular group."); Oppenheimer, supra note 30, at 923 (defining intent as "a conscious discriminatory motive"); Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 YALE L.J. 2117, 2189 (1996) (arguing that the Court has defined discriminatory as "a state of mind akin to malice").

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Indeed, in the area of antidiscrimination law, the concept of intent is only tangentially related to animus or illicit motive. Proving that a defendant acted with animus or an illicit motive will generally suffice to establish intent to discriminate, however, neither animus nor motive is required to prove intent. A quick look at the affirmative action cases should clarify this point. n36

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n36 Professor George Rutherglen recently noted, "if anything plainly falls under the description of intentional discrimination, it is affirmative action." George Rutherglen, Discrimination and Its Discontents, 81 VA. L. REV. 117, 125 (1995).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

[*289] The Court has always treated affirmative action as a form of intentional discrimination, albeit one that can be justified under certain circumstances. Yet in the affirmative action context, the motive is usually to aid, rather than to harm, a particular group, and rarely does a question of animus arise in these cases. n37 Even outside the affirmative action context, the Court has repeatedly invalidated the intentional use of race despite the good intentions of the actor. n38 Additionally, in both Title VII and constitutional challenges, the Court has suggested that statistics can be used to establish a prima facie case of intentional discrimination, even though statistics would presumably have little to say about the subjective intent of the decisionmakers. n39 Rather, statistics are used to demonstrate a pattern of differential treatment, regardless of the asserted motive. Indeed, in trying to understand what the Court means by an intent to discriminate, it is important to avoid focussing on subjective mental states.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n37 Most of the Court's affirmative action cases have been decided under equal protection principles and thus, by definition, require proof of intent. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); United States v. Paradise, 480 U.S. 149 (1987); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986). A similar analysis applies to the Court's redistricting cases. See Bush v. Vera, 116 S. Ct. 1941 (1996); Miller v. Johnson, 515 U.S. 900 (1995); Shaw v. Reno, 509 U.S. 630 (1993). Though the language of affirmative action is not used in these cases, it seems clear that the Court treats them as affirmative action cases. See Michael Selmi, Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate, 42 UCLA L. REV. 1251, 1311 n.197 (1995); Girardeau A. Spann, Color-Coded Standing, 80 CORNELL L. REV. 1422, 1422 n.1, 1460 n.203 (1995).

n38 See, e.g., Palmore v. Sidoti, 466 U.S. 429 (1984) (invalidating Florida statute intended to protect children from private racial bias); City of Los Angeles v. Manhart, 435 U.S. 702 (1978) (invalidating the use of sex-based pension plans under Title VII); Norwood v. Harrison, 413 U.S. 455 (1973) (invalidating Mississippi law providing textbooks to racially discriminatory private schools even though the state may have been motivated by "good intentions"). The limited role of motive in antidiscrimination law is consistent with the limited role the notion of motive plays in tort law. See Kenneth W.

Simons, Rethinking Mental States, 72 B.U. L. REV. 463, 471 (1992).

n39 See, e.g., Bazemore v. Friday, 478 U.S. 385, 397-404 (1986) (regression analysis used to prove Title VII violation); Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 310-12 (1977) (using statistics to establish prima facie case of intentional hiring discrimination); International Bhd. of Teamsters v. United States, 431 U.S. 324, 339-40 n.20 (1977) (stating "statistics showing racial or ethnic imbalance are probative in case such as this one only because such imbalance is often a telltale sign of purposeful discrimination"); Castaneda v. Partida, 430 U.S. 482, 494 (1977) (relying on statistical proof to establish equal protection violation in selection of grand jury). To be sure, the Court has cautiously applied the principle developed in the Teamsters case and generally requires some evidence in addition to the statistical evidence in order to establish a prima facie case. Yet, these cases suggest that subjective intent is largely irrelevant to the legal question of differential treatment.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

What the Court means by intent is that an individual or group was treated differently because of race. Accordingly, a better approach is to concentrate on the factual question of differential treatment. In this way, the key question is whether race made a difference in the decisionmaking process, a question that targets causation, rather than subjective mental states. n40

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n40 See, e.g., Paul J. Gudel, Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law, 70 TEX. L. REV. 17, 93 (1991) ("To call an act discriminatory is to characterize it as an act of treating someone differently because of their race, sex, etc."); Rutherglen, supra note 36, at 127 (defining discrimination as arising when a proscribed category "makes a difference").

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

[*290] This definition of intent can be clarified further by taking a closer look at how the Supreme Court has applied its standard. The Court's intentional discrimination cases can be divided into two familiar categories: those that involve facially discriminatory classifications and those that are facially neutral. For facially discriminatory practices and policies, the element of intent is inferred from the language, and the Court engages in no additional inquiry to determine whether the statute or policy was discriminatory. Consequently, in the cases involving facial discrimination, the Court turns its attention to the question of whether the intentional use of race or gender was permissible. These cases, however, arise infrequently and are now generally confined to either the race-based affirmative action context or to gender-specific practices, such as the recent challenge to the admissions policy of the Virginia Military Institute. n41

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n41 See United States v. Virginia, 116 S. Ct. 2264 (1996) (holding that exclusion of women from citizen-soldier program violated Equal Protection Clause); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (holding that racial classifications must receive strict scrutiny); City of Richmond v. J.A.

Croson Co., 488 U.S. 469 (1989) (holding that plan giving preference to minority contractors not narrowly tailored to a compelling government interest). Outside the constitutional context, such facial classifications are typically limited to explicit gender classifications or, with respect to race, in defining the reach of a particular statute on private conduct. See International Union of Auto. Workers v. Johnson Controls, 499 U.S. 187 (1991) (invalidating gender-specific fetal protection policy); Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (upholding denial of tax exemption to racially discriminatory private college); City of Los Angeles v. Manhart, 435 U.S. 702 (1978) (invalidating gender-specific pension statute); Runyon v. McCrary, 427 U.S. 160 (1976) (invalidating private school's racially discriminatory admissions policy under 42 U.S.C. @ 1981).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

More commonly, statutes and policies challenged as discriminatory are facially neutral, and the court must infer intent from the fact of differential treatment. This inference is generally drawn based on the accumulated evidence, which is almost always circumstantial in nature. Here, it is important to emphasize that the need to rely on circumstantial evidence to prove intent is not a new issue. Following the passage of the historic Civil Rights Acts in the mid-1960s, discrimination began to take on new and more subtle forms, and overt or blatant racial classifications gradually became the exception rather than the rule in legal challenges involving allegedly discriminatory conduct. n42 As a result, since the early 1970s the Court has consistently acknowledged the increasingly subtle nature of discrimination and stated that its task is to remain vigilant in identifying even the most subtle acts of discrimination. n43

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n42 For a more detailed discussion of this issue, see infra notes 85-89 and accompanying text. As an indication that this issue is not new, Thomas Pettigrew observed back in 1985 that "both at the individual and institutional levels, racism is typically far more subtle, indirect, and ostensibly non-racial than it was in 1964." Thomas F. Pettigrew, New Patterns of Racism: The Different Worlds of 1984 and 1964, 37 RUTGERS L. REV. 673, 686 (1985); see also THROUGH DIFFERENT EYES: BLACK AND WHITE PERSPECTIVES ON AMERICAN RACE RELATIONS 417 (Peter I. Rose et al. eds., 1973) (using the term "subtle racism" to describe allegations made by blacks against white liberals).

n43 See, e.g., Rose v. Mitchell, 443 U.S. 545, 559 (1979) (noting that "today . . . discrimination takes a form more subtle than before. But it is not less real or pernicious"); Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (acknowledging that "women still face pervasive, although at times more subtle, discrimination"); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973) (noting that "Title VII tolerates no racial discrimination, subtle or otherwise").

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

[*291] Addressing the element of intent through inference is not a simple task. Occasionally, intent will be clear from statements in the record or other direct evidence, n44 but, like cases involving facial discrimination, these cases are rare, and more frequently the evidence will be purely circumstantial. When the evidence is circumstantial, it will be necessary for the Court to

determine whether that evidence supports a conclusion that the practice or policy constitutes intentional discrimination. As discussed in the next section, the Court has provided some guidance as to how this determination should be made. Yet the Court often had difficulty following its own guidance, particularly when doing so would lead to invalidating governmental practices or policies as discriminatory.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n44 See, e.g., Hunter v. Underwood, 471 U.S. 222 (1985) (invalidating statute involving crimes of moral turpitude based on direct evidence of discriminatory intent when the statute was passed in 1901); Palmore v. Sidoti, 466 U.S. 429 (1984) (invalidating statute that prohibited child custody in interracial families); Norwood v. Harrison, 413 U.S. 455 (1973) (invalidating Mississippi law providing free textbooks to private racially discriminatory schools).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

B. THE REVERSING THE GROUPS TEST

In my judgment, the best test developed to date for identifying intentional discrimination is known as the "reversing the groups test." n45 This test requires asking a counterfactual to determine the ultimate question of discrimination: if the person applying for a job had been white rather than African-American, or had been a man rather than a woman, would the employer have taken the same action? n46 In the voting context, the question becomes whether voters would have voted for a particular candidate if the candidate had been white instead of African-American? n47 In other words, if the proscribed category were removed, would the complaining party have been treated the same? Professor David Strauss, who articulated the test, notes that this counterfactual approach to discrimination issues comports with our common understanding of what discrimination means -- namely, that it is a form of impermissible differential treatment -- and likewise suggests that the factual issue of intent is generally proved through a causal inference. n48

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n45 Professor David Strauss most fully articulated the reversing the groups test. See David A. Strauss, Discriminatory Intent and the Taming of Brown, 56 U. CHI. L. REV. 935 (1989).

n46 Id. at 957; see also Eric Schnapper, Two Categories of Discriminatory Intent, 17 HARV. C.R.-C.L. L. REV. 31, 51 (1982).

n47 In a similar fashion, the Court has defined the statutory prerequisites to establishing racial bloc voting as requiring an inquiry into whether the results would have been different if the election took place only among white or black voters. See Thornburg v. Gingles, 478 U.S. 30, 54-58 (1986).

n48 See Strauss, supra note 45, at 958.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

This definition of intentional discrimination can be explicated through Personnel Administrator v. Feeney, n49 a case decided three years after

Washington v. Davis. Feeney involved a Massachusetts law that gave an absolute preference to veterans for state civil service positions. Under this scheme, veterans enjoyed preference over nonveterans for all state jobs upon passing the civil service [*292] examination, regardless of the precise test score received. n50 Because over ninety-eight percent of Massachusetts veterans were male, the provision effectively limited the availability of civil service jobs for women. n51 Feeney, a civilian woman who continually scored higher than men on civil service examinations, yet was continually passed over for positions in favor of male veterans because of the legislative preference, challenged the law as a violation of her equal protection rights. The Court rejected her constitutional challenge, holding that she failed to prove intent. Importantly, in defining what would constitute intentional discrimination, the Court adopted a standard of causation. The Court stated: " 'Discriminatory purpose' . . . implies that the decision-maker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." n52

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n49 442 U.S. 256 (1979).

n50 Id. at 263-64.

n51 Id. at 270. In many ways, Feeney was a challenge to an affirmative action plan for veterans, and it remains one of the few affirmative action plans upheld by the Court.

n52 Id. at 279.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Accordingly, the Feeney Court engaged in the counterfactual described earlier: if the majority of veterans had been women, would the legislature have passed the law? This counterfactual inquiry is often difficult to conduct; however, under this approach intentional discrimination means only that a person was treated differently because of race or gender or some other proscribed category. The petitioner need not prove that the decisionmaker acted with any animus or illicit motive. Indeed, the Court relies on the Feeney test in a wide variety of contexts, and with one possible exception, none of the cases has stated animus or illicit motive as a requirement for establishing intent. n53

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n53 See Miller v. Johnson, 515 U.S. 900 (1995) (invalidating race-based voting districts); Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) (invalidating city ordinance proscribing free exercise of religion); Hernandez v. New York, 500 U.S. 352, 360 (1991) (denying equal protection claim based on peremptory challenges in jury selection); Wayte v. United States, 470 U.S. 598, 610 (1985) (denying equal protection challenge to selective enforcement policy); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982) (invalidating ordinance proscribing school busing); Harris v. McCrae, 448 U.S. 297 (1980) (denying equal protection claim based on decision not to fund abortions); Mobile v. Bolden, 446 U.S. 55 (1980) (denying Fifteenth Amendment challenge to city's at-large electoral system).

The possible exception is the Court's recent decision in Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993). There, in holding that intent was a necessary element of a conspiracy charge brought pursuant to @ 1985(3), the Court on several occasions used the term animus. Id. at 270, 273 n.4. However, in its opinion the Court also relied on past precedent and focussed primarily on the distinction between purpose and effect. See id. at 275, 284. Therefore, with respect to the Court's focus on intent, this case is best seen as involving the Court's traditional refusal to consider discrimination based on pregnancy to be a form of intentional sex discrimination. See Geduldig v. Aiello, 417 U.S. 484, 496 (1974) (holding that refusal to include pregnancy within disability system was gender-neutral). As a result, the Court viewed the defendants' actions, which were intended to interfere with the right to abortion, as having an adverse effect on women, rather than as being directed at women. Bray, 506 U.S. at 270-71. Other than the discussion in Bray, the Supreme Court has confined its focus on animus to two dissenting opinions. See Goodman v. Lukens Steel Co., 482 U.S. 656, 685 (1987) (Powell, J., concurring in part and dissenting in part) (suggesting the need to prove animus); Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 509 (1979) (Rehnquist, J., dissenting) (defining intent in the school desegregation context as encompassed by the question: "Is a desire to separate the races among the reasons for a school board's decision or particular course of action?").

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*293] Although he coined the phrase "reversing the groups," Professor Strauss has criticized the Court's standard on the grounds that the inquiry necessitated by the test is so inherently speculative that it often leads to meaningless judicial inquiries. In support of this criticism, Strauss points out that applying the test in a constitutional challenge to a statute regulating abortion would require asking whether the law would have been passed if men could become pregnant, an inquiry Strauss contends does not lend itself to judicial resolution. n54 There is some force to Strauss's argument, and under certain scenarios, including the abortion context, it would be nigh impossible for a court to reasonably answer the question posed by Feeney. But these scenarios are limited, and the Feeney test offers a useful analytical construct in the vast majority of discrimination cases.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n54 Strauss relies on two unusual examples to support his critique -- the state action doctrine as applied in Shelley v. Kraemer and the abortion doctrine as formulated in Roe v. Wade. See Strauss, supra note 45, at 965-68, 990-91. In discussing the state action doctrine in Shelley, Strauss concludes: "To ask how a state would react to racial covenants if whites, instead of blacks, had been the principal victims of discrimination . . . is to ask what would have happened if whites were not whites and blacks were not blacks." Id. at 974-75. For a similar critique, see Louis M. Seidman, Public Principle & Private Choice: The Uneasy Case for Boundary Maintenance Theory of Constitutional Law, 96 YALE L.J. 1006, 1038-39 (1987) (critiquing Court's approach in Feeney because it requires courts to "speculate on the likely political outcome").

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Indeed, Strauss's critique of the test is only persuasive under an extremely mechanistic interpretation of the Court's standard and through use of examples

in which the test would not apply. Contrary to Strauss's assumption, the Feeney test applies only to situations in which: (1) intent must be inferred, and (2) comparative evidence is available to guide the Court's inquiry. n55 As I will discuss more fully in the next section, these cases tend to involve common questions of disparate treatment and can be assessed by examining evidence of what occurred in comparable situations.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n55 With respect to the abortion cases, the Court continues to treat discrimination based on pregnancy, and the related question of abortion, as falling outside the ambit of the Equal Protection Clause. See discussion and cases cited supra note 53.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Nevertheless, Strauss correctly concludes that the reversing the groups test can prove especially demanding. In a case like Feeney, in which the proof rests entirely on the effects of the statute at issue, the Court's standard of proof probably cannot be met. n56 Yet, this critique amounts to little more than a claim that there are some cases that will fail under an intent test which might otherwise succeed under a pure effects test, a conclusion that presumably follows directly from the Court's decision in Washington v. Davis. That said, I will demonstrate that the category of cases in which the distinction between intent and effects proves decisive is quite narrow. Moreover, difficulties plaintiffs face in proving intentional discrimination have more to do with the Court's unwillingness to apply the test rigorously than with the workability of the [*294] reversing the groups test itself. As I discuss in greater depth in the next section, the Feeney test provides a useful means for defining intentional discrimination when applied consistently to situations that require inferential determinations. n57

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n56 See Strauss, supra note 45, at 1002 (criticizing the Court's decision in Feeney).

n57 In addition, it is worth noting that the Feeney test comports with our common understanding of what is meant by equal treatment -- that like cases should be treated alike -- and that the determination of likeness proceeds by analogy. See, e.g., Guido Calabresi, Foreword: Antidiscrimination & Constitutional Accountability (What the Bork-Brennan Debate Ignores), 105 HARV. L. REV. 80 (1991) (discussing the centrality of the antidiscrimination principle to various theories of judicial review). Indeed, Strauss concedes that the reversing the groups test is "a useful way to test whether an umpire has been impartial: one asks whether the umpire would have made the same decision if the players' team affiliations had been reversed." Strauss, supra note 45, at 958-59. Of course, no one truly asks the umpire, but Strauss is instead providing a descriptive account of the thought process in which one engages to determine the ultimate question of impartiality. On the function of analogical reasoning, see EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 1-10 (1949); Cass Sunstein, On Analogical Reasoning, 106 HARV. L. REV. 741 (1993).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

In sum, in a case of intentional discrimination, the plaintiff must prove that the defendant treated a member of a protected group -- in the context of this article African-Americans -- differently because of his or her race. n58 Unless the above standard is defined in a loose and ultimately meaningless way so as to constitute racial animus, no additional proof of animus or motive is necessary. Along the same lines, it is unnecessary to prove that the defendant acted with conscious intent or was aware of the implications of the actions taken. In defining intentional discrimination, the question is not what the particular decisionmaker subjectively intended, but whether the record allows for an inference that an impermissible factor such as race served as the impetus for the challenged action. n59 In short, proving the fact of differential treatment suffices to demonstrate intentional discrimination, although proving that fact can be an exceptionally difficult task given the Court's limited understanding of the reality and force of discrimination.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n58 See, e.g., International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 (1977) (defining disparate treatment as being "racially premised").

n59 This is also largely the process that is used in defining motive in the First Amendment context, in which the Court likewise infers motive through indirect means. See Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 U. CHI. L. REV. 413 (1996); Robert Post, Recuperating First Amendment Doctrine, 47 STAN. L. REV. 1249 (1995).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

II. PROVING DISCRIMINATION

After defining intentional discrimination to concentrate the analysis on the question posed by Feeney relating to differential treatment rather than on subjective mental states, the remaining question is how the legal determination of an intent to discriminate is made. At the outset, it is useful to note that as a general matter, the question of discrimination ought to be treated like any other civil cause of action. This means that the plaintiff need only prove her case by a preponderance of the evidence. By definition, this standard does not necessarily establish what actually occurred, nor does it carry with it a judgment of truth. Rather, the preponderance of the evidence standard merely involves a legal [*295] determination that based on the evidence, the factfinder is appropriately certain that the plaintiff proved her case. n60

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n60 See GASKINS, supra note 4, at 25 ("the language of judicial fact-finding generally avoids the concept of truth, preferring instead to speak of probability and degrees of certainty that fall short of complete demonstration"); Frederick Schauer & Richard Zeckhauser, On the Degree of Confidence for Adverse Decisions, 25 J. LEGAL STUD. 27, 28 n.1 (1996) ("In law, the 'burden of proof' refers to the idea of a level of confidence necessary for a proposition to be taken as established by the evidence, without referring specifically to any particular level of confidence" (emphasis in original)).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Contending that the normal rules of civil procedure ought to apply to discrimination cases may seem unexceptional, if not banal. However, discrimination law has long been treated as a unique area of civil litigation that requires proof structures and rules that are distinct from the rules and procedures that govern other civil disputes. For example, even though discrimination cases are subject to the preponderance of the evidence standard, this standard of proof is only rarely mentioned in discrimination cases. Indeed, in the last twenty years, the Supreme Court has explored the meaning and relevance of the standard of proof on only two occasions. n61 Therefore, it is important to keep in mind that discrimination is proven in the same manner as any other civil cause of action: discrimination is proven based on the evidentiary record that is adduced and the reasonable inferences that can be drawn from that evidence. The critical question at the heart of antidiscrimination doctrine is what those inferences are -- when is it fair to draw a conclusion of discrimination and based on what evidence? In other words, what evidence will be treated as offering proof of the indicia of discrimination? As discussed below, these questions relating to the role of inferences in proving discrimination explain the origin and development of the proof structures the Court adopted for adjudicating discrimination disputes, and may also shed light on why discrimination is so difficult to prove.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n61 The two cases are the Court's recent decision in St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993), discussed further in Part IIC3b, and the Court's unanimous decision in Bazemore v. Friday, 478 U.S. 385 (1986), in which the Court stated what is definitionally true in any civil case: "A plaintiff in a Title VII suit need not prove discrimination with scientific certainty." Id. at 400. The Court mentions the preponderance of the evidence standard in most discrimination cases without discussing its importance. See, e.g., Patterson v. McLean Credit Union, 491 U.S. 164, 179 (1989) ("If a plaintiff has proven by a preponderance of the evidence . . . ." (citation omitted)); Price Waterhouse v. Hopkins, 490 U.S. 228, 253 (1989) (plurality opinion) ("Conventional rules of civil litigation generally apply to Title VII cases, and one of these rules is that parties to civil litigation need only prove their case by a preponderance of the evidence"); EEOC v. Ford Motor Co., 458 U.S. 219, 224 (1982) (noting that court found "by a preponderance of the evidence that Ford's justifications were 'unworthy of credence'").

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

A. THE EVOLUTION OF THE COURT'S DISCRIMINATION DOCTRINE

The Court's doctrine involving the proper structure for proving discrimination was a surprisingly late development given the prominence of discrimination both in our nation's history and in the Court's docket. Indeed, the Court did not turn its attention in earnest to the question of how to define or prove discrimination until the 1970s. n62 Prior to that time, the Court concerned itself [*296] with cases that could largely be defined as wholesale exclusions of African-Americans or women from certain aspects of social and political life. These cases included outright segregation, as in the school cases, or addressed laws that entirely excluded African-Americans and women from the political process, as occurred with voting and jury service.

n63 In some of these cases the exclusions were written into law, as in Brown v. Board of Education, but after the passage of the Civil Rights Acts in the early 1960s, the Court was increasingly called upon to infer discrimination from practices arising under otherwise racially neutral laws. Reviewing the evolution of the Court's antidiscrimination doctrine will help explain how the Court's later doctrine relating to ostensibly neutral laws developed.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n62 See Paul Brest, Race Discrimination, in THE BURGER COURT: A COUNTER-REVOLUTION THAT WASN'T 113 (Vincent Blasi ed., 1983) (noting that "the egregious nature of discrimination in the 1950s and 1960s . . . made life . . . easy for the Warren Court").

n63 See, e.g., Sims v. Georgia, 389 U.S. 404, 407 (1967) (per curiam) (finding of jury discrimination based on statistical disparities; Court reversed without state having filed a response); Whitus v. Georgia, 385 U.S. 545, 552 (1967) (finding of jury discrimination based on statistical disparities); Swain v. Alabama, 380 U.S. 202, 222-28 (1965) (finding no discrimination even though no African-American had ever served on a petit jury); Griffin v. County Sch. Bd., 377 U.S. 218, 230-31 (1964) (finding equal protection violation when county closed public schools while funding segregated private schools); Watson v. City of Memphis, 373 U.S. 526, 535-38 (1963) (finding equal protection violation when public facilities remained segregated while city sought gradual desegregation); Eubanks v. Louisiana, 356 U.S. 584, 587 (1958) (finding equal protection violation in long-standing practice of excluding African-Americans from grand juries).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

1. Discrimination Law Prior to the 1960s

One of the first cases in which the Court sought to define what acts constitute discrimination under the Equal Protection Clause was Yick Wo v. Hopkins. n64 In Yick Wo, the city of San Francisco restricted the use of laundries housed in buildings made of wood to those who obtained permits from the city, an issue that was of primary interest to Asians who owned nearly all such laundries. n65 After establishing the law, the city refused to issue permits to Asians who applied for them, while it granted permits to the few non-Asians who sought them. n66 Although the law had a clear disparate effect in that it overwhelmingly disadvantaged the Chinese laundry owners, it was not the effect alone that prompted the Court to invalidate the San Francisco law. Rather, the law's effect, [*297] along with its uneven application, provided evidence of an intent to discriminate. n67

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n64 118 U.S. 356 (1886).

n65 Id. at 358.

n66 The numbers were rather striking: at the time the legislation was passed, there were approximately 320 laundries in San Francisco, 310 of which were located in wooden buildings. All of the permit applications of the approximately 200 Chinese applicants were denied while all but one of the 80 applications

from non-Chinese were granted. See id. at 358-59. Professor Tribe has noted that the city of San Francisco disputed these factual findings and he suggests that "it is possible that Yick Wo was decided on facts that never occurred." LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW @ 16-17, at 1483 n.3 (2d ed. 1988). Professor Tribe explains: "The city insisted that only two of the 80 non-Chinese laundry owners had applied for permits and that many of the non-Chinese owners had also been arrested for operating in non-conforming buildings." Id. If it is true that the Court reached out to decide this case on such disputed facts, the case may be best classified as a Lochner-era freedom of contract case rather than a case about discrimination.

n67 The Court noted that "the facts shown establish an administration directed so exclusively against a particular class" that was administered with "an evil eye and an unequal hand" as to constitute the denial of equal protection. Yick Wo, 118 U.S. at 373-74.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

To grasp the relevance of Yick Wo to the Court's later doctrinal development, it is important to understand why the statistical evidence introduced in the case allowed an inference of discrimination. In Yick Wo, the pattern of denying applications to all Chinese who applied, while granting applications to all but one of the non-Chinese applicants, was so stark as to exclude any rational explanation for the government's action, thus leaving discrimination as the only plausible explanation. But why was discrimination a plausible explanation? Although the answer to this question may seem obvious, it is sometimes useful to make the obvious explicit: discrimination was a plausible explanation given the social background and expectation of discriminatory treatment toward the Chinese. Without this background, there would have been no reason to suspect discrimination as the impetus for the city's change in law, as other race-neutral reasons may have been equally or more plausible.

The Court's equal protection doctrine developed against this background of discrimination, as informed by our nation's history. Absent some explanation, discrimination was presumed to be the reason for actions that one would probably not expect in a race-neutral world. n68 As a result, when juries were devoid of minorities, or voting schemes perpetuated all-white political parties, the Court was able to identify discrimination as the most probable explanation. n69 In this way, the Court often relied on stark statistical disparities as proof that observed conditions could only have resulted from the force of discrimination. n70 To be sure, the evidence often fell short of proving discrimination to the Court's satisfaction, but the Court nevertheless remained true to the principle that purposeful discrimination could be proved by creating an inference that the existing condition would not have resulted from a race-neutral procedure. n71 In [*298] the language of statistics, discrimination was treated as a relevant explanatory variable.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n68 The Court's clearest statement of this relation is found in a Title VII case, International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). There, it stated:

Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful

discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.

Id. at 339-40 n.20

n69 See Castaneda v. Partida, 430 U.S. 482, 494 (1977) (discrimination in selection of grand jury); Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960) (voting rights).

n70 For example, in Eubanks v. Louisiana, 356 U.S. 584, 587 (1958), the Court explained: "We are reluctantly forced to conclude that the uniform and long-continued exclusion of Negroes from grand juries shown by this record cannot be attributed to chance, to accident, or to the fact that no sufficiently qualified Negroes have ever been included in the lists submitted to the various local judges."

n71 Akins v. Texas, 325 U.S. 398, 403-04 (1945) (noting that "systematic exclusion of eligible jurymen of the proscribed race or [an] unequal application of the law" could be used to demonstrate intentional discrimination). In several cases the Court found that the statistical disparities adduced in the evidentiary record strongly pointed toward discrimination. For example, in the jury discrimination case of Whitus v. Georgia, 385 U.S. 545 (1967), the Court found that the probability that so few African-Americans would have been called for jury service through a neutral process was so low that it was proper to infer that the results were produced through an intent to discriminate. Id. at 551-52. In Whitus, the calculated probability that the observed results would have been the product of chance was .000006, which would be well within the acceptable range for establishing statistical significance. Id. at 552 n.2. Equally important, in that case, the state offered no explanation for the observed disparity. Id. at 552.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

2. The Easy Cases of the 1960s

The Court first became more intricately involved in adjudicating issues concerning discrimination in the 1960s. During that time, the Court's cases tended to address one of three related areas. I address the first two areas in this subsection, and delve into the third, somewhat different area in the following subsection. First, the Court considered cases that arose in the aftermath of Brown, which required it to define the scope of its holding in that case. n72 These cases, however, were often limited to what has become the increasingly self-contained area of school desegregation in which, over the last forty years, the Court has concentrated on remedying the vestiges of discrimination and has rarely focussed on identifying new violations of the Fourteenth Amendment. n73

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n72 See, e.g., Green v. New Kent County Sch. Bd., 391 U.S. 430, 437-39 (1968) (invalidating freedom of choice plan); Griffin v. County Sch. Bd., 377 U.S. 218, 230 (1964) (holding that closing of schools violated Equal Protection Clause); Goss v. Board of Educ. 373 U.S. 683, 688 (1963) (invalidating one-way transfer

plan); Watson v. Memphis, 373 U.S. 526, 529 (1963) (requiring desegregation of municipal facilities).

n73 This focus on remedial questions continues to occupy the Court. See Missouri v. Jenkins, 515 U.S. 70 (1995) (reviewing remedial programs in Kansas City); Freeman v. Pitts, 503 U.S. 467 (1992) (concerning gradual compliance with court orders); Board of Educ., v. Dowell, 498 U.S. 237 (1991) (regarding standards for dissolving consent decrees).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

The second area in which the Court became active involved laws that were purportedly neutral, but which were either premised on invidious discrimination or designed to evade previous Court mandates. This category involved situations in which African-Americans and whites were nominally treated the same, but in which the discriminatory purpose of the legislation was clear from either its development or application. For example, in Anderson v. Martin, the Court invalidated a Louisiana law requiring that the race of all candidates be designated on ballots. n74 Despite the law's facial neutrality, the Court unanimously concluded that requiring racial designations facilitated and promoted racial prejudice at the polls and was therefore impermissible because "that which cannot be done by express statutory prohibition cannot be done by indirection." n75 Several years later, in Gaston County v. United States, n76 the Court struck down North Carolina's literacy test on similar grounds, concluding [*299] although the law was neutral, it had, in fact, been used to disenfranchise African-Americans. To support its holding, the Court reasoned that the timing of the law's passage, as well as the inferior quality of schools provided to African-Americans in North Carolina, demonstrated that the law's purpose was to disenfranchise African-Americans. n77

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n74 See Anderson v. Martin, 375 U.S. 399 (1964).

n75 Id. at 404. Around the same time, the Court invalidated a Florida statute that made it a criminal offense for unmarried interracial couples to live together. McLaughlin v. Florida, 379 U.S. 184 (1964); see also Loving v. Virginia, 388 U.S. 1 (1967) (invalidating Virginia law prohibiting interracial marriage).

n76 395 U.S. 285 (1969).

n77 Id. at 294-95. The Court's invalidation of North Carolina's literacy test highlighted a shift in the Court's vision of what constituted discrimination, as only a decade earlier the Court upheld the state's literacy test, with Justice Douglas's unanimous decision proclaiming that "literacy and illiteracy are neutral on race." Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 51 (1959) (footnote omitted). One difference between the two cases is that in Lassiter, the Court upheld the literacy test against a constitutional challenge while in Gaston, the Court struck down the requirement as violating the Voting Rights Act. Nevertheless, the difference in the cases seems steeped in the Court's understanding of discrimination after the passage of the Civil Rights Acts rather than in the source of the violation. Indeed, in Lassiter, the Court undertook little constitutional analysis of the literacy tests other than suggesting that such a test properly ensured an informed electorate. See id.

at 50-52.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

The cases in these two areas share a common core. In each instance, the policy at issue could be explained on no basis other than race. Although literacy may be relevant to voting, and in some circumstances a test of literacy might be desirable, the manner in which the North Carolina test was adopted left no question, at least after the passage of the Civil Rights Acts, that the purpose was to exclude African-Americans from participating in the political process. The same held true in Yick Wo: even if it was appreciably more dangerous to have laundries in wooden buildings, the city's uneven application of the law revealed that its true purpose was to prohibit the Chinese from operating laundries.

Out of these cases arose the principle of pretext, a concept that is central to the Court's equal protection doctrine and forms the core of the Court's general antidiscrimination doctrine. The principle of pretext commands the Court to determine whether the stated reason for an action or practice is the true reason, or whether it is a pretext for discrimination, a principle that makes sense only when discrimination is seen as a powerful explanatory variable. n78

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n78 Cf. Edwards v. Aguillard, 482 U.S. 578, 586-89 (1987) (holding that state's rationale for teaching creationism in conjunction with evolution was implausible and thus was intended to promote religion); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448-50 (1985) (invalidating local law that singled out homes for the mentally retarded for special treatment while leaving unexplained why similar structures were not similarly zoned).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

3. The More Difficult Cases of the 1960s

In the third area of cases, the Court infers discrimination based on its perception that the act at issue would not have occurred but for some race-based intent. Although the Court rarely involved itself in this area in the 1960s, these cases demonstrate the importance race can play as an explanation for events arousing the Court's suspicion. The classic example of this third category is the voting rights case, Gomillion v. Lightfoot. n79 In Gomillion, the state of Alabama altered the boundaries of the city of Tuskegee to create an oddly shaped configuration that resulted in the exclusion of nearly all African-Americans [*300] from the city limits, while retaining all of the white residents. n80 Based primarily on the unusual shape of the district -- one that had little precedent and which was unlikely to have arisen without some purpose in mind -- the Court found that if the plaintiffs' factual allegations proved true, "the conclusion would be irresistible" that the legislation was intended to fence African-American voters out of the city limits. n81 Several years later in the case of Hunter v. Erickson, n82 the Court relied on Gomillion to invalidate a housing ordinance that placed "special burden[s] on racial minorities within the governmental process." n83

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n79 364 U.S. 339 (1960).

n80 Id. at 341.

n81 Id.

n82 393 U.S. 385 (1969).

n83 Id. at 391.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

These two decisions are notoriously difficult to interpret and seem to share the principle that underlies the Court's pornography cases -- that the Court knows discriminatory acts when it sees them. n84 To the Court, neither the housing ordinance nor the legislation defining the Tuskegee city limits would have been passed absent their explicit racial effect. n85

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n84 Several commentators have previously noted this aspect of the Court's voting rights doctrine. See Samuel Issacharoff, Polarized Voting & the Political Process: The Transformation of Voting Rights Jurisprudence, 90 MICH. L. REV. 1833, 1845 (1992); Pam Karlan, Still Hazy After All These Years: Voting Rights in the Post-Shaw Era, 26 CUMB. L. REV. 287, 287 (1996).

n85 See John Hart Ely, Legislative & Administrative Motivation in Constitutional Law, 79 YALE L.J. 1205, 1252 (1970) (concluding that in Gomillion "the disproportionate impact, coupled with the strange shape of the new city, established beyond doubt that the Alabama legislature had employed race as a criterion of selection"). The Court reached a similar conclusion several years later in invalidating the city of Emporia's attempt to create a new school district so as to free itself from a county plan that was under a desegregation order. See Wright v. Council of Emporia, 407 U.S. 451 (1972). In striking down the new school district, the Court expressed skepticism as to the city's motive, noting that the city found "its arrangement with the County both feasible and practical up until the time of the desegregation decree issued in the summer of 1969." Id. at 469.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

But perhaps the more interesting aspect of these cases, one that foreshadows the Court's subsequent discrimination doctrine, is that the decisions in which the Court inferred discrimination based on what it considered the undeniable implications of the underlying action were all quite short in length and included little principled reasoning. For example, Gomillion spans eight and one-quarter pages in the United States Reports and produced no dissenting opinion. n86 The Court's decision in Hunter was nearly identical in length and, though likewise unanimous, was quite obscure as to the source of the constitutional violation. n87 These cases provided an early indication of what was later to become prominent in the Court's jurisprudence, namely that once states moved away from overt racial exclusions, the Court found it considerably more difficult to define what constituted discrimination. Yet, the Court remained willing to invalidate discriminatory practices when it saw them. The question was, and still is, when would it see discrimination?

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n86 Justice Whittaker, however, wrote a one-page concurring opinion. Gomillion, 364 U.S. at 349 (Whittaker, J., concurring).

n87 Hunter, 393 U.S. at 385-93.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

[*301] In one sense, Hunter and Gomillion were easy cases, as the Court had little difficulty identifying a violation. But in a more prescient sense, they were difficult cases from which to build a principled adjudication of antidiscrimination law. n88 This conclusion became clear several years later in White v. Regester, in which the Court invalidated the Texas legislature's multimember districting schemes, holding that the "totality of the circumstances," including Texas's long history of discrimination against African-Americans and Latinos in the political process, demonstrated that the election scheme was "used invidiously" to dilute minority voting strength. n89 Again, only three pages of the Court's unanimous opinion discussed the relevant evidence, and no clear test emerged from the Court's decision. n90 Accordingly, as the Court became more involved in cases of complex discriminatory acts, the principles of adjudication proved elusive.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n88 The Court recently relied on Hunter to invalidate a Colorado proposition that explicitly intended to erect a barrier to legislation offering protection against discrimination to gay men and lesbians. See Romer v. Evans, 116 S. Ct. 1620, 1629 (1996). In this way, the Court's decision in Hunter has been extended beyond the context of race discrimination, but as in Hunter, the basis for the Court's decision in Romer is not as clear as the result may suggest. See Daniel Farber & Suzanna Sherry, The Pariah Principle, 13 CONST. COMMENTARY 257 (1996) (discussing Romer).

n89 White v. Regester, 412 U.S. 755, 766-67 (1973).

n90 See Issacharoff, supra note 84, at 1843-44 (discussing the difficulty of applying the Court's totality of circumstances test).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

B. THE COURT'S MODEL OF PROOF

Soon after deciding Hunter v. Erickson in 1969, the Court began to encounter an increasing number of cases that required it to draw inferences of discrimination, particularly in the employment context. n91 Prior to the 1970s, the Court rarely became involved with race discrimination cases involving employment disputes. n92 Indeed, the rise of employment discrimination cases marked a decided turn in the Court's doctrine, at least in part because these cases presented the Court with new theories and potentially expansive intervention into the private workplace, an area which the Court had always been hesitant to enter. n93 Moreover, when the Court turned to the workplace, the race cases presented difficult questions that almost always turned on subtle, rather than [*302] overt, discrimination, and thus required the Court to

explore in greater detail the meaning of discrimination. For example, in one of the first employment cases to come before the Court under Title VII, the Supreme Court held that proof that a particular employment policy had a disparate effect on African-Americans could suffice to establish a statutory violation. n94 In so holding, the Court essentially redefined unlawful discrimination in the employment context to include the effects, rather than simply the intent, of the practice. n95 As already noted, several years later the Court reached a contrary conclusion for constitutional causes of action, suggesting that the employment cases offered a sober indication of the legal difficulties that were on the horizon. n96

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n91 See generally Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

n92 However, employment cases were certainly not unfamiliar to the Court because many of the Court's early equal protection and due process cases involved employment disputes. See, e.g., Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947) (upholding Louisiana law for selecting river boat pilots); Lochner v. New York, 198 U.S. 45 (1905) (invalidating law regulating hours of bakers). The Court also had a number of early, and now notorious, cases involving sex discrimination. See, e.g., Muller v. Oregon, 208 U.S. 412 (1908) (upholding maximum hour legislation for women); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873) (upholding law denying married women right to practice law).

n93 Daniel Ortiz has suggested that the Court tends to take a hands-off approach to areas that are subject to market control, such as employment and housing, and is more likely to intervene in political areas subject to governmental control. See Daniel Ortiz, The Myth of Intent in Equal Protection, 41 STAN. L. REV. 1105 (1989). While Ortiz presents an intriguing explanation, and one that nicely reconciles seemingly disparate cases, I discuss infra note 172, why his theory fails fully to persuade.

n94 See Griggs v. Duke Power Co., 401 U.S. 424 (1971).

n95 See id. Importantly, the Court could have analyzed Griggs as a case of intentional discrimination because the employer failed to justify the need for its employment practices -- practices that resulted in the wholesale exclusion of African-Americans from certain job categories. Moreover, the employment practices in question in Griggs were adopted on the day the 1964 Civil Rights Act became effective, providing further evidence that the employer intended the practices to perpetuate a segregated work-place. Id. at 427. George Rutherglen has suggested that disparate impact cases are properly analyzed as involving complicated procedures for proving intentional discrimination. See George Rutherglen, Disparate Impact Under Title VII: An Objective Theory of Discrimination, 73 VA. L. REV. 1297 (1987). Understood in this fashion, the Court may have seen Griggs as a case of subterfuge or pretext -- an unjustified practice that has the effect of excluding African-Americans from employment will be treated as discrimination. Nevertheless, at least in recent years, the Court has not viewed disparate impact cases as a form of intentional discrimination and has, instead, consistently distinguished between disparate treatment and disparate impact cases. See, e.g., International Bhd. of Teamsters v. United

States, 431 U.S. 324, 335 n.15 (1977).

n96 See Washington v. Davis, 426 U.S. 229, 248 (1976). There are a number of plausible reasons that may explain the Court's decision in Washington v. Davis, including the stated explanation that allowing individuals to go forward based on proof of disparate effects would allow for challenges to the status quo wherever racial disparities were found, and the Court did not appear eager to permit such broad challenges. See id. Another reason may have been that with the 1972 amendments to Title VII, making the statute applicable to public employers, it was no longer necessary for plaintiffs to proceed under the Constitution for claims of employment discrimination against public employers. This alternative remedy may have aided the Court's decision, and also may suggest that the case was a poor vehicle to determine the important question of the scope of the constitutional protection against discrimination.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

1. The Arlington Heights Factors

Although much of the Court's doctrine during the period following Hunter involved employment discrimination, the Court's most important discussion concerning the means by which discrimination is proved arose in the context of housing discrimination, a subject infrequently addressed by the Court. n97 Shortly after ruling in Washington v. Davis, the Court decided Village of Arlington Heights v. Metropolitan Housing Development Corp., n98 in which it specifically addressed the question of how to prove the constitutional element of intent [*303] necessary to establish a violation of the Equal Protection Clause. In light of the fact that the Court had previously stated that legislative motive was generally irrelevant to proving a constitutional violation, n99 the Court felt compelled to explain how constitutional intent was distinct from legislative motive, and it used Arlington Heights as the vehicle for providing the explanation.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n97 See Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) (standing question); Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979) (standing to sue as testers); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972) (current tenants have standing); James v. Valtierra, 402 U.S. 137 (1971) (referendum); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (scope of statute); Reitman v. Mulkey, 387 U.S. 369 (1967) (referendum).

n98 429 U.S. 252 (1977).

n99 See Palmer v. Thompson, 403 U.S. 217 (1971). Palmer might be said to be flatly inconsistent with the Court's decision in Washington v. Davis, but at the time of Arlington Heights, the Court seemed determined to try to reconcile the two cases. See Arlington Heights, 429 U.S. at 265-66 & nn.10-12.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

The plaintiffs in Arlington Heights sought to build low-income housing project in the Arlington Heights suburb of Chicago. The suburb was nearly all-white, n100 and the evidence adduced at trial indicated that one of the reasons for the village's racial composition was the lack of affordable

housing. n101 To build the development, the Housing Corporation required that its parcel be rezoned to permit multiple-family dwellings. n102 Approximately forty percent of those eligible to live in the proposed 190-unit development would have been African-American, and assuming forty percent of the development's residents would have been African-American, the village's African-American population would have increased by one thousand percent. n103 The village refused to grant the rezoning permit, and the plaintiffs filed suit, alleging that the refusal represented a denial of equal protection. In the lower courts, the plaintiffs proceeded on both disparate treatment and effects theories, but only prevailed on their disparate effects claim in the appellate court. n104 Given the Court's intervening decision in Washington v. Davis, by the time the case reached the Supreme Court it was necessary to establish that the village's refusal to grant the rezoning request was intentionally discriminatory. n105

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n100 Based on the 1970 census, only 27 of the 64,884 residents were African-Americans. See Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409, 414 (7th Cir. 1975).

n101 Id. at 413-14. The Court of Appeals noted that "based solely on the cost of presently available housing of all types in the Chicago area, blacks would occupy five percent of the housing in Arlington Heights." Id. at 414. The plaintiff argued that the parcel it had sought to purchase was the only available economically feasible parcel for low-income housing in the Village, a fact that, on remand from the Supreme Court, the Court of Appeals determined was dispositive of whether the Village's action had violated the Fair Housing Act. See Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1294 (7th Cir. 1977). Upon remand from the appellate court, the case was settled through an agreement to build a modified development on an alternate site that was located near, but not in, Arlington Heights that was to be annexed by the Village of Arlington Heights. The residents of the area to be annexed objected to the proposed settlement on grounds similar to the objections originally stated by Arlington Heights but the district court approved the settlement over those objections. See Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 469 F. Supp. 836 (N.D. Ill. 1979), aff'd, 616 F.2d 1006 (7th Cir. 1980). The project was built and remains functioning today. Telephone Interview with Professor Robert Schwemm, Univ. of Kentucky Law School (Sept. 13, 1996).

n102 Arlington Heights, 429 U.S. at 254.

n103 Arlington Heights, 517 F.2d at 414.

n104 Id. at 418.

n105 Arlington Heights, 429 U.S. at 268.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

The Supreme Court began its analysis in Arlington Heights by emphasizing the necessity of proving intent to show a violation of the Equal Protection [*304] Clause, n106 and proceeded to state a proposition that has become central to the Court's discrimination doctrine: "Determining whether invidious

discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." n107 One means of proving intent, the Court stated, was by a stark pattern of exclusion, yet the Court also acknowledged that "absent a pattern as stark as that in Gomillion or Yick Wo, impact alone is not determinative, and the Court must look to other evidence." n108 Here the Court framed the inquiry by placing Yick Wo and Gomillion at one end of the spectrum of facially neutral statutes that were clearly unconstitutional, and Washington v. Davis at the other end as representing those neutral statutes that, despite their disparate effects, were plainly constitutional. The difficult question -- one the Court returns to time and again -- was where to place the cases falling between these extremes.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n106 Id. at 264.

n107 Id. at 266.

n108 Id. (footnote omitted).

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

As a means of providing instruction to courts regarding how intent could be proved through circumstantial evidence, the Court listed a number of factors it deemed relevant as evidence of discrimination. Those factors included the "historical background of the decision," "a specific sequence of events" that led up to the challenged decision, "departures from the normal procedural sequence," as well as substantive departures, and the legislative and administrative history of the decision. n109 Significantly, none of the factors listed in Arlington Heights requires proof of knowledge or awareness on the part of the actor, but rather all are circumstantial facts that give rise to an inference of discrimination. n110 Nevertheless, in announcing these factors, the Court failed to explain why they were relevant to identifying intentional discrimination, and explaining the Court's unstated rationale is essential to understanding how a court determines when a plaintiff has succeeded in proving discrimination.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n109 Id. at 267.

n110 It is also worth noting that the Court dedicated only three pages of its decision to reviewing the record. Id. at 268-71.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Here, it may be helpful to consider basic principles of evidence, because in many ways the elements identified in Arlington Heights are best seen as evidentiary principles. As the most basic proposition, evidence is relevant when it is more probative than not, when it aids the decisionmaker in reaching a determination on the ultimate issues. n111 In this light, the Arlington Heights factors are relevant because they provide indicia of discrimination; these factors are relevant because our experience suggests they are likely indicative of discriminatory acts. For example, when legislatures deviate from customary practices where race may be a factor, and no reasonable explanation for the

departure is forthcoming, the legislature's action is understood against the historical fact that legislatures have often made distinctions based on race in [*305] order to disadvantage minority groups. n112 Other than our history of racial discrimination, there is no reason that deviations from legislative procedures would be relevant to proving intentional racial discrimination. As was also true with Yick Wo, absent a history of discrimination, such departures might have been indicative of a propensity to vote against zoning requirements for any number of reasons, including a race-neutral preference for preserving the status quo. But race, we know, is different, and so, at least in Arlington Heights, the Court suggested that certain inferences could be drawn based on our knowledge and expectations of the operations of legislatures -- inferences that would not be plausible absent that historical background. In law, as elsewhere, actions and evidence acquire their meaning from experience and context. n113 That is why the set of considerations now known as the Arlington Heights factors is relevant to proving discrimination -- the Court inferred discrimination based on deviations from accepted procedures and the other identified factors, despite other potential explanations, because race offered the strongest explanation for these observed actions. n114

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n111 See FED. R. EVID. 403.

n112 I have tried to state this sentence as neutrally as possible to include the possibility, which the Court treats as real and present, that when in the majority African-Americans, or other racial groups presently in the minority, will use race to disfavor whites. See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 495 (1989) (noting that majority of Richmond's city council were African-American). Although this scenario is possible under certain circumstances, I believe it is improper to treat all races the same, given our history and the continued underrepresentation of people of color and women in nearly all socially desirable aspects of society. See, e.g., Neil Gotanda, A Critique of "Our Constitution is Colorblind", 44 STAN. L. REV. 1, 18-23 (1991) (critiquing legitimacy of colorblindness); Harris, supra note 12, at 1775 (stating that "to assert that whites have an equivalent right to a level of review designed to protect groups and peoples subordinated by white supremacy is to seek to legitimate an usurpation").

n113 For an interesting article discussing the importance of context to legal meaning, see Lawrence Lessig, The Regulation of Social Meaning, 62 U. CHI. L. REV. 943 (1995).

n114 Cf. Paul Brest, Foreword: In Defense of the Antidiscrimination Principle, 90 HARV. L. REV. 1, 7 (1976) ("Our history and traditions provide strong reasons to suspect that racial classifications ultimately rest on assumptions of the differential worth of racial groups.").

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

The Court's analysis in Arlington Heights closely parallels the Court's approach to "suspect classifications" under the Equal Protection Clause, as well as the Court's analysis in Yick Wo. n115 The term "suspect classification" arises from our reasonable inferences: when the government draws racial classifications, we are immediately suspicious, given our history of governmental use of such classifications to subordinate entire classes of

individuals. n116 These suspicions prompt the Court to require the government to justify its classifications through compelling evidence. Absent some compelling and rational explanation, we presume the purpose to be discriminatory -- an inference demanded by history. n117 Importantly, the Court did not create any per se rules of discrimination [*306] in Arlington Heights, but rather provided guidance to lower courts as to what acts or evidence were relevant to a finding of discrimination.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n115 For a full discussion of Yick Wo, see supra notes 64-67 and accompanying text.

n116 This is, in essence, what the Court said when it initially defined the term. See Korematsu v. United States, 323 U.S. 214, 216 (1944) ("All legal restrictions which curtail the civil rights of a single racial group are immediately suspect.").

n117 This is also one reason why, as John Hart Ely pointed out long ago, one can argue that affirmative action ought to be subjected to a different level of scrutiny. As Ely noted, there is no reason to be suspicious when the majority chooses to disadvantage itself. See John Hart Ely, The Constitutionality of Reverse Racial Discrimination, 41 U. CHI. L. REV. 723, 735-36 (1974). Of course, the analysis becomes more difficult when African-Americans control the legislature, as was true in Richmond, Virginia, when the Court struck down racial set-asides, but has not been true in any of the Court's other affirmative action cases. See Croson, 488 U.S. at 495.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

2. Demanding Proof Beyond the Arlington Heights Factors: Memphis v. Greene

Arlington Heights represents the Court's clearest articulation of how intent is proven. At the same time, it emphasizes that proof of discrimination ultimately relies on the willingness of a particular court to draw inferences of discrimination in those cases falling between outright exclusion, and those cases (such as Feeney and Washington v. Davis) in which circumstances creating the disparate effects do not lend themselves as readily to an inference of discriminatory intent. The Court faced precisely such a situation only three years after deciding Arlington Heights in the case of Memphis v. Greene. n118

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n118 451 U.S. 100 (1981).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

The dispute in Greene concerned the city's decision to close a street to traffic -- but it was not just any street, and not just any traffic. Rather, the residents of an all-white enclave, Hein Park, sought to close a street to traffic heading north toward a predominantly African-American neighborhood. n119 The city justified the street closing by arguing that it would reduce traffic flow so as to increase safety to children and diminish "traffic pollution," which was defined to include "noise, litter, and interruption of community living." n120 In opposition to the street-closing proposal, one thousand

citizens presented a petition to the city council, although the majority relegated this fact to a footnote. n121

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n119 Id. at 103-04. Although the proposal was rejected by the city council when it was first submitted in 1970, it was approved three years later following a subsequent submission.

n120 Id. at 104.

n121 Id. at 105 n.5.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Those were the pertinent facts as the majority saw them, but in dissent Justice Marshall saw the case quite differently. The opening of his dissent is worth quoting at length:

This case is easier than the majority makes it appear. Petitioner city of Memphis, acting at the behest of white property owners, has closed the main thoroughfare between an all-white enclave and a predominantly Negro area of the city. The stated explanation for the closing is of a sort all too familiar: "protecting the safety and tranquility of a residential neighborhood" by preventing "undesirable traffic" from entering it. Too often in our Nation's history, statements such as these have been little more than code phrases for racial discrimination. These words may still signify racial discrimination, but apparently not, after today's decision, forbidden discrimination. n122

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n122 Id. at 135-36 (Marshall, J., dissenting).

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*307] These words, as well as the majority's narrative, emphasize how it is impossible to "know" discrimination in the abstract. Rather, one can only see discrimination in context -- a fact that the majority conceded when it noted that "most of the relevant facts . . . of the litigation are not in dispute. The inferences to be drawn from the evidence, however, are subject to some disagreement." n123 As it turns out, Justice Marshall's observation that the proffered explanation was "all too familiar" simply did not resonate for the Court majority; it seems the explanation was all too familiar only to Justice Marshall, the only Justice to have stood on the other side of those traffic barriers. n124

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n123 Id. at 102.

n124 Justices Brennan and Blackmun also joined Justice Marshall's dissenting opinion in Greene.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

The Court's decision in Greene is notable for its failure to apply the Feeney test. Applying the test to the facts of Greene would have allowed the Court to view the case through either of two prisms. First, reversing the groups, the Court might have considered whether the white residents would have sought to close the street if the drivers of the cars passing through had been white instead of African-American. In that case, would the traffic still have been deemed "undesirable"? A second approach would have required the Court to ask whether the city would have granted the street closing request if it had come from a predominantly African-American neighborhood seeking to close off traffic patterns to white drivers.

Rather than take either of these approaches, the Court began its analysis by focussing on the extent of inconvenience the African-American drivers would face as a result of the street closing. n125 Though the lower court made no finding on the inconvenience issue, Justice Stevens, writing for the Court, carefully diagrammed the new traffic pattern and concluded: "although it is correct that the motorists who will be inconvenienced by the closing are primarily black, the extent of the inconvenience is not great." n126

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n125 Id. at 111.

n126 Id. at 111-12.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

The irony of the Court's approach should be readily apparent: in an intentional discrimination case such as Greene, it seems questionable, to say the least, to begin by concentrating on the effect of the street closing and considering whether the injury was in some fashion de minimus. Nevertheless, once the Court accepted the injury as de minimus, it was quick to gloss over the evidentiary record and find that the street closing was not racially motivated. n127 For example, testimony at the trial suggested that city residents sought to close out "undesirable traffic" from the area, which the court of appeals interpreted to mean that the traffic was "undesirable" because the overwhelming majority of the drivers were African-Americans. n128 To support its conclusion, the appellate [*308] court noted that in closing this particular street, the city invoked a municipal procedure never before used for a street closing, n129 a factor the Supreme Court deemed relevant in Arlington Heights. n130 The history of segregation in Memphis, as well as the absence in the record of evidence that would disprove the assumption that "undesirable" referred to race, likewise helped persuade the appellate court that the race of the drivers using the neighborhood as a thruway prompted the street closing. Indeed, the record was devoid of any comparative evidence as to whether traffic in this neighborhood was any worse than traffic in other neighborhoods, or whether more children played in this neighborhood, or whether the traffic traveled through this neighborhood at particularly high speeds. Evidence along these lines might have indicated that the desire to close the street was honestly, and legitimately, concerned with traffic hazards.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n127 The district court found that the street closing was not racially motivated; the court of appeals, on the other hand, read the record as demonstrating racial motivation. Greene v. City of Memphis, 610 F.2d 395, 397-404 (6th Cir. 1979). In its analysis, the Supreme Court largely determined which was a better reading of the record.

n128 See id. at 398-99.

n129 Id. at 398. The court of appeals had invalidated the street closing under the Thirteenth Amendment, although in dissent Judge Celebrezze applied the Arlington Heights factors and concluded that there had been no discrimination. See id. at 409 (Celebrezze, J., dissenting).

n130 See Arlington Heights, 429 U.S. at 267.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

But the city presented no such evidence, and, more important, the Supreme Court did not demand any. Instead, the Court saw the city's decision as justified by the importance of discretion to local governments, specifically noting that local governments need "wide discretion" in making the policy decisions that govern traffic patterns. n131 While conceding that some of the evidence could be interpreted to suggest that the street closing was racially motivated, the Court ultimately determined that the importance of local discretion trumped the interest in ensuring that local government decisions remained free from discrimination. n132

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n131 Greene, 451 U.S. at 126.

n132 See id.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

That said, determining whether the street closing was, in fact, racially motivated was no easy task. No one involved in the decision made any statements that could be interpreted as indicating unambiguously that the closing was racially motivated, and traffic undeniably poses hazards to children. But the question presented in the case was whether the Court would go beyond this level of analysis to "smoke out" the city's purported justification, as it does in the affirmative action context, n133 or whether it would simply accept the city's [*309] rationale. How would the record evidence be interpreted, and would the Court defer to the lower court's findings? What relevance should the one thousand protesters have, especially if such street closings were never the subject of protests in the past? In short, how does one know whether the street closing was the product of a "white community, disgruntled over sharing its street with Negroes . . . and of a city, heedless of the harm to its Negro citizens, acquiescing in the plan" as Justice Marshall asserted, n134 or of a local government seeking to control a traffic problem and thereby ensure the safety of children, as the majority concluded?

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n133 See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989). There is an interesting contrast with the Court's approach to affirmative action cases, in which the Court essentially presumes the government is not acting in good faith and requires substantial proof of past discrimination in order to justify implementing a contract set-aside program. See id. As a result, jurisdictions that want to use affirmative action programs must engage in extensive and costly studies to justify the programs. See Neal Devins, Adarand Constructors, Inc. v. Pena and the Continuing Irrelevance of Supreme Court Affirmative Action Decisions, 37 WM. & MARY L. REV. 673, 685 (1996) (describing studies). In contrast, the Court in Greene required little from the city beyond the asserted justifications of the city officials who were responsible for the street closing. To be sure, the affirmative action cases involve facial classifications in which the sole question is whether the program can be constitutionally justified, whereas in Greene, no facial classification was at issue, but the question was whether there had been any discrimination, or whether there was sufficient evidence to infer discrimination. Greene, 451 U.S. at 126.

Emphasizing the relevance of the facial classification, however, overlooks that the question in each case was the same -- namely what evidence the Court was willing to accept as evidence of discrimination. In Croson, 99% of the city's contracts were going to white-owned contractors, and yet no inference of discrimination was drawn. Rather the use of race to remedy the situation was labelled discriminatory. Croson, 488 U.S. at 470-72.

n134 Greene, 451 U.S. at 136 (Marshall, J., dissenting).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

What seems clear is that how these contested events are interpreted will depend on one's experience and expectations. As psychologists repeatedly suggest, in ambiguity we are prone to see what we want to see. n135 For the Court this has often meant seeing a world that is largely unaffected by discrimination. The Court's decision in Greene thus suggests that in order to invalidate a policy based on an allegation that it is intentionally discriminatory, the Court will often fail to follow its own precedent, refusing to apply its Feeney test, and requiring something more than proof of the factors announced in Arlington Heights.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n135 See, e.g., John M. Darley & Russell H. Fazio, Expectancy Confirmation Processes Arising in the Social Interaction Sequence, 35 AM. PSYCHOLOGIST 867, 876 (1986) ("A great deal of research suggests that ambiguous behaviors tend to be perceived in a biased manner."); David M. Sanbonmatsu et al., Overestimating Causality: Attributional Effects of Confirmatory Processing, 65 J. PERSONALITY & SOC. PSYCHOL. 892, 899 (1993) ("Our findings indicate that people routinely use biased strategies in which alternative explanations are ignored and causal hypotheses are confirmed.").

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

C. THE DEVELOPMENT OF THE COURT'S MODEL OF PROOF IN PARTICULAR CONTEXTS

1. Voting Rights

The Court's demanding standard for identifying acts of intentional discrimination can be further illustrated by moving from the question of local zoning or traffic decisions to the area of voting rights. In this area, the Court's most important decision may be Mobile v. Bolden, n136 a case that is generally cited for the proposition that intent is a necessary element of a vote dilution claim brought under the Constitution or Section 2 of the Voting Rights Act prior to its 1982 amendments. n137 However, the Court decided Mobile v. Bolden only two [*310] years after Arlington Heights and devoted a significant portion of its decision to reviewing the factual record to determine whether the petitioners had established an intentional violation. n138 Thus, the case, and those that followed it, offer important examples of the kind of evidence the Court considers important to establishing a claim of intentional discrimination.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n136 446 U.S. 55 (1980).

n137 See TRIBE, supra note 66, @ 13-8, at 1078-79 (emphasizing Court's holding as to establishing intent); James F. Blumstein, Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act, 69 VA. L. REV. 633, 674 n.186 (1983) (noting that "a majority [in Bolden] seemed to agree that intentional discrimination was the proper standard to apply in racial vote dilution cases").

n138 Indeed, the lower court specifically found an intentional violation. In some respects the Court's broader holding requiring proof of intent may have been unnecessary to the disposition of the case -- a point Justice White emphasized in his dissenting opinion. See Mobile, 446 U.S. at 94 (White, J., dissenting). Although the district court found an intentional violation, it used the wrong legal definition of intent. See Bolden v. City of Mobile, 423 F. Supp. 384, 393 (S.D. Ala. 1976) (finding the council action discriminatory because the "natural and foreseeable consequences" of the act were discriminatory). The district court relied on the standard the Supreme Court subsequently rejected in Feeney. See Personnel Administrator v. Feeney, 442 U.S. 256, 279 (1979) ("Discriminatory purpose . . . implies more than intent as volition or intent as awareness of consequences."). The court of appeals, however, relied primarily on the Supreme Court's prior voting rights' cases to divine the proper standard for establishing an intentional violation. See Nevett v. Sides, 571 F.2d 209, 221 (5th Cir. 1978) ("A showing of improper motivation or purpose is necessary to establish a valid cause of action under the fifteenth amendment.").

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

a. Mobile v. Bolden. The Mobile v. Bolden case involved a challenge to an at-large voting scheme that was used to elect the governing commission of the city of Mobile, Alabama. Under this system, voters elected the members of the city commission from throughout the district, and could vote for as many candidates as there were positions. Beginning in the early 1970s, these at-large systems were challenged by plaintiffs because they had the predictable effect of ensuring that a majority of the voters in the voting district could control all of the commission seats. n139 Indeed, no African-American in Mobile had ever been elected to the city commission even though African-Americans comprised thirty-five percent of the voting population. n140 Holding first that establishing a violation under the Fifteenth Amendment required proof of

discriminatory intent, the Supreme Court turned to the question of whether the plaintiffs successfully established such intent.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n139 See, e.g., Peyton McCrary et al., Alabama, in QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990, at 39 (Chandler Davidson & Bernard Grofman eds., 1994) [hereinafter QUIET REVOLUTION IN THE SOUTH] ("Politicians in Alabama . . . had long understood that at-large elections enable a white majority -- if it chooses to vote as a cohesive bloc -- to prevent minority representation altogether." (footnote omitted)).

n140 Mobile, 446 U.S. at 58 n.1. Mobile also had a long history of discrimination against African-Americans, including discrimination in municipal services, which the lower courts deemed relevant to understanding why the city wanted to preserve its at-large voting scheme. See Bolden v. City of Mobile, 423 F. Supp. 384, 392-93 (S.D. Ala. 1976) (noting that city's discriminatory history included attempts to disenfranchise African-Americans).

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

The Court held that the plaintiffs failed to establish an intentional violation and, reminiscent of Memphis v. Greene, reached its decision principally by disputing the relevance of the evidence on which the lower courts relied to identify an intentional violation. For example, unlike the lower court, the Supreme Court attached no particular significance to the fact that no African-American had ever won an election through the at-large system, noting instead [*311] that only three African-Americans had ever run for a seat. n141 The Court plurality next labeled the documented evidence of discrimination in providing services to African-Americans as "most tenuous and circumstantial," n142 and similarly dismissed the evidentiary significance of the long history of discrimination in Mobile because it could not directly address the question of whether the at-large system was itself a product of that discrimination. n143 The plurality also dismissed the fact that the at-large system made it especially difficult for African-Americans to elect a candidate of their choice as a natural part of an at-large election system, which by its very nature makes it more difficult for any minority group to succeed. n144 Finally, perhaps the most revealing fact was one the Court consigned to a footnote: a legislative device made it nearly impossible to alter the election system through political channels because any proposal to alter the system was readily -- and in fact repeatedly -- defeated by a veto procedure that could be instituted by a single legislator. n145 This fact is particularly revealing considering that the difficulty of altering a legislative system had earlier prompted the Court's controversial decision to enter the reapportionment arena. n146 Yet, when it came to the perpetuation of an all-white local election scheme in Mobile, the Court found the barriers to such change barely worth mentioning.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n141 Mobile, 446 U.S. at 73. Importantly, the Court failed to explore the reason for the paucity of candidates. On this issue, the Court could have borrowed from the doctrine developed in the employment discrimination context, in which an individual may recover on a discrimination claim even if she never applied for a job as long as she establishes that she failed to apply because she believed an application would be futile. See Dothard v. Rawlinson, 433

U.S. 321, 330 (1977) (discussing the futility of requiring applicants to apply for jobs they could not get).

n142 Mobile, 446 U.S. at 74.

n143 Id.

n144 Id.

n145 Id. at n.21. The Court stated: "According to the District Court, voters in the city of Mobile are represented in the state legislature by three state senators, any one of whom can veto proposed local legislation under the existing courtesy rule. Likewise, a majority of Mobile's 11-member House delegation can prevent a local bill from reaching the floor for debate." The Court later noted that "there was evidence in this case that several proposals that would have altered the form of Mobile's municipal government have been defeated in the state legislature . . . ." Id. The Court, however, balked at inferring discrimination from this evidence.

n146 Reynolds v. Sims, 377 U.S. 533, 568 (1964). For a helpful discussion of the controversy surrounding the Court's entrance in the reapportionment debate, see JOHN HART ELY, DEMOCRACY AND DISTRUST 121-124 (1980). It is worth noting that in Reynolds, the Court invalidated the system for electing the Alabama state legislature. Reynolds, 377 U.S. at 537.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

In his dissenting opinion, Justice White concentrated on the sufficiency of the evidence and expressed dismay at the plurality's willingness to cast aside the lower courts' respective applications of the evidence, chastising them particularly for doing so without ever mentioning the proper standard of review. n147 In this respect, Justice Stevens's concurring opinion was certainly the most honest [*312] and provided the clearest explanation for the Court's action. Justice Stevens accepted that at least some "members of the white majority" were motivated by a desire to keep African-Americans out of the government, but found that motivation was insufficient to overcome the presumed legitimacy of at-large election schemes. n148 After all, Justice Stevens noted, more than one thousand such districts existed across the country. n149

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n147 Mobile, 446 U.S. at 95 (White, J., dissenting) ("The Court's cryptic rejection of [the lower courts'] conclusions ignores the principles that an invidious discriminatory purpose can be inferred from objective factors . . . and that the trial courts are in a special position to make such intensely local appraisals.").

n148 Id. at 83, 92 (Stevens, J., concurring). Justice Stevens wrote:

I am persuaded that some support for [the system's] retention comes, directly or indirectly, from members of the white majority who are motivated by a desire to make it more difficult for members of the black minority to serve in positions of responsibility in city government. . . . But I do not believe otherwise legitimate political choices can be invalidated simply because an irrational or invidious purpose played some part in the decisionmaking process.

Id. at 92. This analysis obviously parallels Justice Stevens's approach in Memphis v. Greene. See supra notes 131-32 and accompanying text.

n149 Mobile, 446 U.S. at 92 (Stevens, J., concurring). The plurality likewise emphasized the prevalence of at-large systems. Id. at 60.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

This latter fact is telling, and a similar sentiment arises repeatedly in the Court's analyses. Justice Stevens and the plurality seemed to fear that declaring this voting district unconstitutional would lead to overturning such districts throughout the country -- a task the Court clearly was unwilling to undertake. Justice Stevens's argument, however, was flawed for at least two reasons.

First, it was little more than judicial hyperbole to suggest that invalidating the system challenged in Mobile would necessarily have led to invalidating all at-large systems; rather, it would have required invalidating only those systems infected by purposeful discrimination. The Court's prior practice clearly supports this conclusion, as the Court had invalidated an at-large system in 1973 n150 and eight years later, when the Court decided Mobile, one thousand at-large systems still existed throughout the country. In emphasizing the prevalence of at-large districts, the Court was likely making an even more insidious point, one that was not merely an exercise in judicial hyperbole.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n150 See White v. Regester, 412 U.S. 755 (1973).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

This second reading of the Court's concern suggests that if forced to choose between the importance of at-large systems and eradicating discrimination, the Court would choose to preserve at-large systems -- a conclusion Justice Blackmun came dangerously close to admitting in his concurring opinion. n151 With this understanding, it becomes apparent that the test the Court chose -- intent as opposed to the allegedly broader effects test -- was largely irrelevant to the Court's ultimate finding that there was no actionable discrimination. Rather, in [*313] Mobile the Court chose to preserve the at-large system despite its discriminatory effects and despite the reason why the city of Mobile sought to maintain its system. n152 As was true in Memphis v. Greene, the Court again failed to ask the question mandated by Feeney: if the at-large system produced a commission composed entirely of African-Americans, would the city have maintained it? Indeed, given that the city originally established the system in 1911, n153 the proper question before the Court in 1980 should have been why the city maintained the at-large system, rather than why it initially created that system -- a question a majority of the Court never directly asked. n154

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n151 In his concurring opinion, Justice Blackmun agreed with Justice White that there was sufficient evidence to infer intentional discrimination but that the lower court exceeded its remedial powers because the city had "a

substantial interest in maintaining the commission form of government that has been in effect there for nearly 70 years." Mobile, 446 U.S. at 81 (Blackmun, J., concurring). Why this would be a concurring opinion, rather than dissenting in part and concurring in the judgment, or a simple dissent along the lines of Justice White because there were five other votes to reverse, is unclear. Moreover, the Court seemingly rejected Justice Blackmun's position in the apportionment decisions issued nearly 20 years prior to Mobile. See, e.g., Reynolds v. Sims, 377 U.S. 533 (1964).

n152 The court of appeals addressed this point explicitly: "The longevity of Mobile's at-large commission government cannot insulate it from review . . . . Indeed, that the at-large plan has existed for over sixty-five years is wholly consistent with the [district] court's ultimate conclusion that the plan has been maintained with the purpose of debasing black political input." See Bolden v. City of Mobile, 571 F.2d 238, 244 (5th Cir. 1978). Interestingly, in the term prior to its decision in Mobile, the Supreme Court expressed a similar sentiment in the context of a desegregation case. In Columbus Board of Education v. Penick, the Court stated: "Adherence to a particular policy or practice, 'with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn.'" 443 U.S. 449, 465 (1979) (quoting Penick v. Columbus Bd. of Educ., 429 F. Supp. 229, 255 (1977)).

n153 See Mobile, 446 U.S. at 59 (plurality opinion).

n154 In dissent, Justice Marshall sought to focus on this question. See id. at 136 n.34.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Not only did the Court fail to ask the Feeney question, but another question remained unasked, namely, what evidence would the Court deem sufficient to override the presumption of legitimacy afforded the at-large election scheme? Perhaps a statement by a majority of the legislators that the system "succeeded" in keeping African-Americans out of political office would have tipped the balance, but short of such an improbable mass declaration, it is not clear what additional evidence the Court would require to establish a violation. n155 Instead, all that was clear was that the Court was not prepared to invalidate Mobile's at-large system because it perceived those systems to be a central facet of local government.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n155 As an interesting coda to the case, on remand the district court again found that the at-large system was designed and maintained for discriminatory purposes. To reach this conclusion, the court reviewed new evidence regarding the history of government in Mobile dating back to the early nineteenth century. See Bolden v. City of Mobile, 542 F. Supp. 1050 (S.D. Ala. 1982).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

b. Rogers v. Lodge. An indication of the kind of evidence that might suffice to strike down a voting scheme as unconstitutional came only two years later in the case of Rogers v. Lodge. n156 In Rogers, the Court again considered a

challenge to an at-large voting scheme. In this instance, however, the Court upheld the lower court's determination that the system was maintained for invidious purposes. Despite similarities in the voting systems at issue in Rogers and Mobile v. Bolden, the evidence of discrimination differed in the two cases, and that difference highlights the kind of evidence that is necessary to establish an intentional violation.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n156 458 U.S. 613 (1982).

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*314] The plaintiffs in Rogers challenged an at-large voting system in Burke County, Georgia, where over fifty-three percent of the population was African-American and thirty-eight percent of the voting population was African-American. n157 Despite the large African-American population, the voters had never elected an African-American to the County Board of Commissioners, and in fact no African-American had ever run for the Board. The Supreme Court, in an opinion written by Justice White, found this evidence probative, noting that "because it is sensible to expect that at least some blacks would have been elected in Burke County, the fact that none have ever been elected is important evidence of purposeful exclusion." n158 This sentiment was reminiscent of the Court's standard in Yick Wo, yet, the same conclusion could have been drawn in Mobile v. Bolden, and the Court was aware that, in light of Mobile v. Bolden, these facts alone were insufficient to establish an intentional violation. n159

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n157 Id. at 623-24.

n158 Id. at 624 (citation omitted).

n159 Id.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Accordingly, the Court proceeded to conduct a close review of the record developed in the lower court -- a record replete with evidence of discrimination directly linked to the voting system. The Court noted that discrimination prior to the passage of the Civil Rights Acts in the mid-1960s suppressed voter registration and participation in the system, as had past discrimination in the educational system that resulted in the continued segregation of some local schools. n160 Property ownership requirements similarly prevented full participation in the political process, and there had been documented discrimination in selecting grand jurors and hiring governmental employees. The Court found a link between the historical discrimination and the at-large voting scheme, noting that although the past practices "were abandoned when enjoined by courts or made illegal by civil rights legislation . . . they were replaced by laws and practices which, though neutral on their face, serve to maintain the status quo." n161 Additional evidence of overt discrimination existed as well, including evidence that only roads in the white neighborhoods were paved and that "seventy-three percent of houses occupied by blacks lacked all or some plumbing facilities" compared to only sixteen percent of white homes. n162 The massive size of the county and the lack of a residency requirement, which

effectively allowed all of the commissioners to reside in a particular neighborhood, provided further evidence that the system was maintained to perpetuate a discriminatory election process. n163

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n160 Id. at 624-25. Of course, other than the continued segregation of the schools, these facts would have applied to any Southern jurisdiction, and the continued segregation of schools would have likewise applied to many jurisdictions.

n161 Id. at 625.

n162 Id. at 626.

n163 Id.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

This evidence was most substantial and, at least as articulated by the Court, [*315] far exceeded the proof established in Mobile v. Bolden. n164 Indeed, given the perpetuation of segregated facilities, Rogers v. Lodge strongly resembled the Court's older segregation era cases, which surely aided the Court in finding this system unconstitutional.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n164 In dissent, Justices Powell and Rehnquist suggested that Rogers could not be reconciled with Mobile, and despite the sheer differences in evidence, there were clear similarities between the two schemes. See Rogers v. Lodge, 458 U.S. at 629 (Powell, J., dissenting). The evidence presented at trial in Mobile was, in fact, more similar to Rogers than it appears from reading the Court opinions, and there was more evidence of racially polarized voting submitted in Mobile than in Rogers, although some of that difference is accounted for by the fact that no African-American had run for county commissioner in Burke County. See Bolden v. City of Mobile, 423 F. Supp. 384, 386-94 (S.D. Ala. 1976). Curiously, Justice Blackmun joined the majority in Rogers even though the remedial plan was in all relevant respects identical to the one he refused to approve in Mobile. Justice O'Connor, who had recently replaced Justice Stewart on the bench, and Chief Justice Burger likewise joined the Rogers majority.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

One can only speculate, however, as to the legacy of these cases, and in particular whether evidence short of that adduced in Rogers v. Lodge would suffice to establish an intentional violation. Shortly after the Court handed down its decision in Rogers v. Lodge, Congress passed the Voting Rights Amendments of 1982, which effectively repudiated Mobile v. Bolden's intent requirement with respect to statutory claims of discrimination. Significantly, that legislation defined what constituted discrimination in clear and definite terms as a way of circumscribing courts' discretion to identify discriminatory voting practices. n165 But the Court nevertheless often interprets the Voting Rights Act narrowly. In particular, as Professor Pamela Karlan has noted, the Court has difficulty seeing discrimination when only a single-member office is at issue. n166 Professor Karlan argues that the fact that whites consistently

win certain single-member offices, such as in mayoral races, appears to the Court to be natural rather than the product of discrimination. n167 Again, in interpreting the 1982 Amendments, the Court's expectations regarding the force of discrimination may be guiding its determinations, even though Congress expressly intended the statute to repudiate the Court's constitutional standard for statutory claims.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n165 The legislative history lists seven evidentiary factors that are to be considered in challenges to at-large voting systems, most of which were present in the Supreme Court's prior decisions. See S. REP. NO. 417, at 28-29 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 206-07. The factors are: (1) history of official discrimination; (2) extent to which voting in the state or subdivision is politically polarized; (3) extent to which the state or subdivision has used voting procedures that could enhance the opportunity for discrimination; (4) whether minorities have been excluded from the candidate slating process, if one exists; (5) extent to which the effects of discrimination have hindered the ability of minorities to participate in the political process; (6) whether political campaigns have been characterized by appeals to race; and (7) extent to which minorities have been elected to public office.

n166 See Pamela S. Karlan, Undoing the Right Thing: Single-Member Offices and the Voting Rights Act, 77 VA. L. REV. 1 (1991).

n167 Professor Karlan writes: "The single-member office doctrine reflects a belief that there is nothing unusual or troubling about a political system in which, whenever there is only one position up for grabs, whites occupy it. White control is seen as the normal, and normatively desirable, state of affairs." Id. at 44.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

c. The Redistricting Cases. Although it might be possible to reconcile Mobile v. Bolden and Rogers v. Lodge by emphasizing the difference in the quality and [*316] quantity of the respective evidentiary records, these cases reflect the Court's continual struggle to define what constitutes unlawful intentional discrimination. Recently, that struggle has taken a decided turn in the voting rights context, as the Court has begun to review voting districts designed specifically to increase opportunities for African-American voters, as a group, to elect representatives of their choosing -- what is known as racial redistricting. Because white voters often refuse to vote for African-American candidates, creating an opportunity for African-Americans to elect representatives of their own choosing generally requires that African-Americans constitute a majority, or near majority, of the voters in a particular district. n168 However, to obtain a critical voting block it is often necessary to draw voting districts with shapes that do not resemble traditional voting districts. The Court has come to view the atypical shape of the districts drawn to maximize opportunity for African-American voters as indicative of intentional, and unlawful, discrimination. As the Court recently explained:

Shape is relevant not because [it] is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in

drawing its district lines. n169

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n168 The phenomenon of racial bloc voting by whites is widely documented. See, e.g., FRANK R. PARKER, BLACK VOTES COUNT: POLITICAL EMPOWERMENT IN MISSISSIPPI AFTER 1965, at 141 (1990) (documenting racially polarized voting in Mississippi); QUIET REVOLUTION IN THE SOUTH, supra note 139 (documenting polarized voting throughout the South); Issacharoff, supra note 84, at 1872 ("Case after case supports the conclusion that the electoral arena remains charged with group-based battles in which the simple cuing device of race or ethnicity serves as the mobilizing force for legions of voters."); Richard H. Pildes, The Politics of Race, 108 HARV. L. REV. 1359, 1374 (1995) (reviewing QUIET REVOLUTION IN THE SOUTH, supra note 139) (noting that only two of the 38 African-American members of Congress were elected by majority white districts). A recent study suggests that it may not always be necessary to have a majority African-American district to ensure representation, and that the necessary range may be 47.3% African-American in the Northwest, and 28.3% in the Northeast. See Charles Cameron et al., Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?, 90 AM. POL. SCI. REV. 794, 804 (1996).

n169 Miller v. Johnson, 500 U.S. 900, 913 (1995); see also Charles Fried, Foreword: Revolutions?, 109 HARV. L. REV. 13, 64 (1995) ("The obvious principle lurking in Shaw was that bizarre geometry was simply the indicium of a forbidden purpose."); Richard H. Pildes, Principled Limitations on Racial and Partisan Redistricting, 106 YALE L.J. 2505, 2542 (1997) ("Intent plays no independent role in the analysis: Shape and other attributes of the districts themselves determine attributions of intent.").

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

The Court's reasoning in the redistricting cases parallels its approach to proving intentional discrimination in other contexts. With respect to redistricting, shape is indicative of discrimination because the Court contends that the "bizarre" shapes of the districts, to use the Court's language, would not have resulted absent the legislature's concern for maximizing opportunities for racial minorities to elect a representative of their choosing. n170 At a different time in [*317] our history, unusual shapes might have suggested a desire to protect rural over urban regions, to favor a certain political party, or perhaps as a means of fencing out African-Americans. n171 But today shape provides the Court with evidence sufficient to draw an inference of a discriminatory intent to reduce the voting strength of white voters.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n170 See Miller, 515 U.S. at 916 (discussing traditional race-neutral districting principles). Professor Samuel Issacharoff recently summarized the Court's redistricting cases by noting: "Where race or racialism is visible to the casual eye, it is constitutionally infirm." Samuel Issacharoff, The Constitutional Contours of Race and Politics, 1995 SUP. CT. REV. 45, 64.

n171 See Reynolds v. Sims, 377 U.S. 533, 567-68 (1964) (finding that state failed to redraw districts in order to protect rural counties against urban centers); Gomillion v. Lightfoot, 364 U.S. 339, 346 (1960) (finding city

limits drawn to fence out African-Americans). It is also quite possible that a desire to protect rural counties may be based on racial discrimination if the urban centers include larger concentrations of African-Americans than the rural areas.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Ironically, the redistricting cases represent one of the few areas in which the Court is now willing to draw an inference of discrimination based on circumstantial evidence and does so based primarily on the expected norms of a district uninfluenced by racial considerations. n172 At the same time, it would be somewhat misleading to classify these cases as involving circumstantial evidence, given that the districts were explicitly drawn to ensure increased opportunities for African-Americans, and, not surprisingly, redistricting has been quite successful in electing African-Americans and Latinos to Congress. n173 These facts suggest that the redistricting cases are more akin to the affirmative action cases in which the intentional use of race is largely conceded and the Court's analysis centers on whether the practice can be justified. The results of the Court's inquiry and analysis of the redistricting cases powerfully supports the affirmative action analogy: the Court has yet to find a district drawn on racial lines that is constitutionally permissible. n174

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n172 Professor Daniel Ortiz has suggested that the Court tailors its doctrine depending on the importance of the right at stake, and in cases that are subject to market control, like housing or employment, the Court requires a higher level of proof that approaches actual motivation. See Ortiz, supra note 93, at 1140-42. The Court, however, has never suggested that different substantive areas are subject to different levels of proof, and it seems a better understanding of the doctrine is gained by focusing on what evidence is relevant under the circumstances. Accordingly, in those circumstances in which statistical evidence, or shape, gives rise to inferences of discrimination, the Court will be more likely to find a constitutional violation.

n173 See Holly Idelson, Court Takes a Harder Line on Minority Voting Blocs, CONG. Q. WKLY. REP., July 1, 1995, at 1944 (discussing historic gains African-Americans and Hispanics made in 1992 election as a result of redistricting); Ronald Smothers, U.S. District Court Upholds 'Gerrymander' for Blacks, N.Y. TIMES, Aug. 3, 1994, at 12 (noting that racial redistricting helped "increase[] the number of black members of Congress to 39 in 1992 from 26 in 1990"). It is still too early to discern the effects of the Supreme Court's decision in Shaw v. Reno, though the recent 1996 elections suggest that African-American incumbents may have an easier time succeeding in a majority white district than African-Americans who are running for the first time. See Kevin Sack, Victory of 5 Redistricted Blacks Recasts Gerrymandering Dispute, N.Y. TIMES, Nov. 23, 1996, at 1.

n174 See Bush v. Vera, 116 S. Ct. 1941 (1996) (invalidating Texas legislative districts); Shaw v. Hunt, 116 S. Ct. 1894 (1996) (invalidating North Carolina congressional redistricting); Miller v. Johnson, 515 U.S. 900 (1995) (invalidating Georgia congressional redistricting). On one occasion, the Court has let a congressional district stand when it dismissed the challenge because the plaintiffs lacked standing. See United States v. Hays, 515 U.S. 737 (1995) (dismissing challenge to Louisiana's congressional redistricting plan).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*318] 2. Applying the Arlington Heights Factors in the Criminal Context: From Batson to McCleskey

The question of how intentional discrimination is defined and proved also arises in the criminal context. Two cases in particular, decided within a year of each other, offer insights into the Court's doctrine: Batson v. Kentucky n175 and McCleskey v. Kemp. n176 The Court's decision in Batson illustrates not only the importance of the Feeney causal inference inquiry to identifying discrimination, but also the manner in which context determines how discrimination is proved, or inferred. McCleskey, on the other hand, demonstrates just how difficult it can be to prove discrimination when other values, in this instance prosecutorial discretion and the death penalty, are involved.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n175 476 U.S. 79 (1986).

n176 481 U.S. 279, 294-99 (1987).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

a. Batson v. Kentucky. At issue in Batson v. Kentucky was the factual basis necessary to challenge a prosecutor's use of peremptory strikes as a violation of the Equal Protection Clause. n177 The Court had addressed this issue some twenty years earlier, and at that time, the Court held that it was necessary to establish a pattern of discrimination to invalidate the use of peremptory challenges. n178 In Batson, the Court considered whether a criminal defendant could establish discriminatory use of peremptory challenges without having to show a pattern of discrimination.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n177 Batson, 476 U.S. at 82.

n178 See Swain v. Alabama, 380 U.S. 202 (1965).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Echoing its earlier decision in Gomillion v. Lightfoot, the Batson Court began its analysis by noting that under certain circumstances, the discriminatory impact of a practice may give rise to an inference of discrimination "because in various circumstances the discrimination is very difficult to explain on nonracial grounds." n179 The Court further explained that the factual determination of discrimination is based on the "totality of relevant facts," and that the history of exclusion of African-Americans from jury service gave particular meaning to the use of peremptory challenges. The Court stated: "The reality of practice . . . shows that the [peremptory] challenge may be, and unfortunately at times has been, used to discriminate against black jurors." n180 Therefore, evidence that African-Americans were excluded from jury service required close scrutiny "because the Court has declined to attribute to chance the absence of black citizens on a particular

jury array where the selection mechanism is subject to abuse." n181 In other words, when a suspicious pattern of behavior is presented -- one that is supported by sufficient evidence to allow an inference of discrimination -- an explanation will be demanded whereas no explanation would be demanded if, for example, the prosecutor struck all left-handed people from the jury.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n179 Batson, 476 U.S. at 92.

n180 Id. at 99.

n181 Id. at 95.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

[*319] Critical to the Court's analysis was the recognition that the system of jury selection was subject to abuse as a result of the discretion that pervaded the process. When an individual enjoys broad discretion, as in the case of a peremptory challenge (which, by definition, requires no explanation for the prosecutor's decision), there is a clear opportunity for that discretion to be exercised in a discriminatory fashion. The Court noted that a criminal defendant could rely on this fact in establishing an inference of discrimination. n182 This is an important, and in many respects rare, acknowledgment by the Court that discretion provides an opportunity for discrimination, and it was this acknowledgment that provided a framework for inferring discrimination in the use of peremptory challenges. n183 In many ways, the Batson Court was following the principles it first enunciated in Yick Wo and more elaborately set forth in Arlington Heights. With respect to peremptory challenges, the Court found an inference of discrimination to be permissible because history indicated that juries had long been a focus of discrimination, and the discretion inherent in peremptory challenges could be used to further discriminatory purposes.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n182 Specifically, the Court stated: "The defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" Id. at 96 (citation omitted).

n183 The test the Court developed in Batson closely resembles the procedure for establishing a prima facie case in employment discrimination cases. See Note, True Lies: The Role of Pretext Evidence Under Batson v. Kentucky in the Wake of St. Mary's Honor Center v. Hicks, 94 MICH. L. REV. 488 (1995); see also infra text accompanying notes 210-221.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

On the surface, Batson seemed to signal an awareness of the powerful influence discrimination can play in selecting juries, hinting, at least in the abstract, that the Court might promote the Constitution's antidiscrimination principle over the importance of discretion to the criminal justice system. Yet, as Justice Marshall ominously noted in his concurring opinion, the Court's decision actually provided the more limited holding that, as a theoretical matter, an individual need not establish a pattern of discrimination in order

to state a claim of discrimination in the jury selection process. n184 This holding, however, failed to address the broader question of whether, as a practical matter, the Court would be willing to accept anything less than a clear pattern of exclusion to prove a claim of discrimination. Justice Marshall expressed skepticism that a court would find sufficient facts to satisfy the Court's enunciated rhetorical standard. Therefore, as a way of eliminating the discrimination endemic to the jury selection process, Justice Marshall called for banning the practice of peremptory challenges because he believed that "conscious or unconscious racism" would lead courts to accept reasons that were, in fact, imbued with racism. n185

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n184 Batson, 476 U.S. at 102 (Marshall, J., concurring).

n185 Id. at 103 (Marshall, J., concurring). For an engaging and thorough discussion of Justice Marshall's opinion in Batson, see Charles J. Ogletree, Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges, 31 AM. CRIM. L. REV. 1099 (1994).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Justice Marshall's analysis proved prescient. Despite extending Batson to [*320] other contexts, n186 the Court has, in fact, been loathe to find an actual incidence of a race-based peremptory challenge. n187 Moreover, the Court's decision the following Term in McCleskey v. Kemp largely retracted the Court's concerns regarding prosecutorial discretion, quickly closing whatever door had been opened by Batson.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n186 See J.E.B. v. Alabama, 511 U.S. 127 (1994) (gender); Georgia v. McCollum, 505 U.S. 421 (1992) (criminal defendants); Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) (civil actions).

n187 See Purkett v. Elem, 514 U.S. 765 (1995) (reversing appellate decision noting that prosecutor's neutral reason need not be persuasive, or even plausible); Hernandez v. New York, 500 U.S. 352 (1991) (finding striking of Spanish-speaking jurors race-neutral). Professor Johnson has noted that in the aftermath of Batson, few courts found the use of peremptories to be discriminatory. See Sheri Lynn Johnson, Unconscious Racism and the Criminal Law, 73 CORNELL L. REV. 1016, 1022-24 (1988).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

b. McCleskey v. Kemp. The defendant in McCleskey sought to demonstrate that the Georgia death penalty statute was applied in a discriminatory fashion. To support his claim, the defendant presented a study documenting that an African-American who killed a white person had a substantially greater probability of receiving the death penalty than any other class of defendant. n188 The case, however, was complicated by at least two factors. First, the Baldus study, on which McCleskey based his case, involved a massive regression study that provided only general, rather than specific, conclusions. As a result, the study indicted the Georgia system while having little to say about whether Warren McCleskey's particular case had been influenced by

discrimination -- a fact that is true of any statistical evidence that focusses on the group rather than the individual. n189 Thus, the Court determined that the statistical evidence was only weakly probative in relation to McCleskey's claim that he was the victim of discriminatory prosecution and sentencing n190 -- a conclusion that was tantamount to suggesting that statistical analysis alone could not prove an individual claim of discrimination in the criminal context. n191 The second complicating [*321] factor was that the strongest statistical evidence of discrimination related to the race of the victim, rather than race of the defendant, an issue that was by no means easily resolved. n192

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n188 McCleskey v. Kemp, 481 U.S. 279, 286 (1987). Professor Randall Kennedy aptly summarized the study as follows: "Applying a statistical model that included the thirty-nine non-racial variables believed most likely to play a role in capital punishment in Georgia, the Baldus study indicated that the odds of being condemned to death were 4.3 times greater for defendants who killed whites than for defendants who killed blacks . . . ." Randall L. Kennedy, McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court, 101 HARV. L. REV. 1388, 1397-98 (1988) (footnote omitted).

n189 The Court's clearest statement regarding the relevance of the study came in its discussion of McCleskey's Eighth Amendment challenge: "Even Professor Baldus does not contend that his statistics prove that race enters into any capital sentencing decisions or that race was a factor in McCleskey's particular case. Statistics at most may show only a likelihood that a particular factor entered into some decisions." McCleskey, 481 U.S. at 308 (footnote omitted). The Court footnoted Professor Baldus's trial testimony where he conceded that he was unable to determine with "moral certainty" that McCleskey's particular case was influenced by discrimination.

n190 Id. at 297-99.

n191 The obvious parallel in the use of statistical analysis is in the area of employment discrimination, in which regression analyses similar to those introduced in McCleskey are commonplace in proving class action claims of discrimination. See Bazemore v. Friday, 478 U.S. 385 (1986). It is perhaps noteworthy that Bazemore was decided the year before McCleskey, but it is also important to recognize that in the employment area statistical evidence is often insufficient to prove an individual claim of discrimination. See International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

n192 For an interesting discussion of this aspect of the case, see Kennedy, supra note 188, at 1421-29.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

These complicating factors led the Court to diminish the weight of the evidence and to promote the importance of discretion to the criminal justice system. For example, on McCleskey's equal protection claim the Court stated: "Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused." n193 The Baldus study, the Court concluded, failed to reach the level of "exceptionally clear proof" necessary to establish purposeful discrimination. n194 Later, in that part of the opinion concerning McCleskey's

Eighth Amendment challenge, the Court reiterated the importance of discretion to the criminal justice process: "Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious." n195 This sentiment represented a decided shift from the Court's earlier doctrine, which, as I have noted, had long been premised on the notion that in a legal proceeding involving a claim of discrimination, the unexplained was more likely than not the product of discrimination. But in McCleskey the Court explicitly stated, at least in the context of the criminal justice system, it would no longer treat discrimination as a relevant explanatory variable, thus repudiating its line of cases from Yick Wo to Arlington Heights. Instead, the Court's prior presumption that the unexplained could be attributed to discrimination was withdrawn to be replaced with an evidentiary standard that called for "exceptionally clear proof" of discrimination.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n193 McCleskey, 481 U.S. at 297.

n194 Id.

n195 Id. at 313.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

c. Reconciling Batson and McCleskey. The Court's analysis in McCleskey presents many difficulties, most of which have been discussed in the extensive literature on the case. n196 For example, it is certainly curious that the Court demanded such a high standard of proof in a capital case, considering the Court's repeated pronouncements regarding the need for careful scrutiny of such cases because death is the ultimate sanction. n197 Nevertheless, for the purposes of the argument I am setting forth in this article, the important aspect of the Court's decision is its clear tension with Batson, in which the Court had explicitly noted that discretion in the criminal process presented an opportunistic [*322] means for discriminatory acts. n198 However, when it came to applying that principle in an individual case, the importance of discretion trumped the concern with discrimination. This retreat highlights the irony of McCleskey. In Batson, the Court had overruled its prior decision in Swain v. Alabama and thereby held that it was not necessary for a criminal defendant to prove a pattern of discrimination in order to sustain a challenge to the selection of the jury venire. Yet, in McCleskey, the Court held that establishing a pattern of discrimination, which the Court at least nominally accepted that the Baldus Study accomplished, n199 was insufficient to establish an equal protection violation. As was the case with Mobile v. Bolden, what the Court did not explain is what evidence would suffice to establish a claim: what did McCleskey need to prove? After all, it appears that he satisfied the Feeney test: the Baldus Study demonstrated there was a strong likelihood that had McCleskey been white n200 and his victim been an African-American, or even if his victim had been white, his sentence would have been different. But the Court never asked the Feeney question directly, and was unwilling to accept the general implications of the statistical data because it could not conclusively determine whether there had been discrimination in the specific case.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -